19-16017

United States Court of Appeals

FOR THE NINTH CIRCUIT

RICHARD DENT; JEREMY NEWBERRY; ROY GREEN; J. D. HILL; KEITH VAN HORNE; RON STONE; RON PRITCHARD; JAMES MCMAHON; MARCELLUS WILEY; JONATHAN REX HADNOT, JR., On Behalf of Themselves and All Others Similarly Situated,

Plaintiffs-Appellants,

—v.—

NATIONAL FOOTBALL LEAGUE, a New York unincorporated association,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR NORTHERN CALIFORNIA, SAN FRANCISCO

RECORD EXCERPTS
VOLUME I OF I
(Pages ER1 to ER291)

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

RICHARD DENT, *et al.* Plaintiffs, v. NATIONAL FOOTBALL LEAGUE, a New York unincorporated association, Defendant.	**CASE NO. 3:14-CV-02324 WHA** **NOTICE OF APPEAL AND REPRESENTATION STATEMENT**

[1] Mr. Byrne passed away unexpectedly on January 6, 2019.

ER 2

NOTICE IS HEREBY GIVEN THAT all plaintiffs in the above-captioned case hereby appeal to the United States Court of Appeals for the Ninth Circuit from this Court's April 18, 2019 entry of judgment.

Dated: May 14, 2019

Respectfully Submitted,

/s/

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ER 3

REPRESENTATION STATEMENT

Pursuant to Rule 12(b) of the Federal Rules of Appellate Procedure and Circuit Rule 3-2(b), Plaintiffs-Appellants submit this Representation Statement. The following list identifies all parties to the action and their respective counsel by name, firm, address and telephone number.

Parties	**Counsel**
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CERTIFICATE OF SERVICE

I am employed in the City of Baltimore, State of Maryland. I am over the age of 18 and not a party to the within action; my business address is 201 N. Charles St., Suite 2600, Baltimore, MD 21201 and my email address is dfarmer@mdattorney.com.

On May 14, 2019, I caused to be served the following document described as:

NOTICE OF APPEAL AND REPRESENTATION STATEMENT

on the following interested parties:

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by:

X (BY ELECTRONIC SERVICE VIA CM/ECF SYSTEM) In accordance with the electronic filing procedures of this Court, service has been effected on the aforesaid party(s) above, whose counsel of record is a registered participant of CM/ECF, via electronic services through the CM/ECF system.

_____(BY PERSONAL SERVICE)

_____(BY EMAIL) I am readily familiar with the firm's practice of email transmission; on this date, I caused the above-referenced document(s) to be transmitted by email and that the transmission was reported as complete and without error.

_____(BY MAIL) I am readily familiar with the firm's practice for the collection and processing of correspondence for mailing with the United States Postal Service and the fact that the correspondence would be deposited with the United States Postal Service that same day in the ordinary course of business; on this date, the above-referenced correspondence was placed for deposit at Baltimore, Maryland and placed for collection and mailing following ordinary business practices.

ER 6

_____(BY FEDERAL EXPRESS) I am readily familiar with the firm's practice for the daily collection and processing of correspondence for deliveries with the Federal Express delivery service and the fact that the correspondence would be deposited with Federal Express that same day in the ordinary course of business; on this date, the above-referenced document was placed for deposit at Baltimore, Maryland and placed for collection and overnight delivery following ordinary business practices.

I declare under penalty of perjury under the laws of the State of Maryland that the above is true and correct.

Executed on May 14, 2019 at Baltimore, Maryland.

/s/
Desirena J. Farmer

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

RICHARD DENT, JEREMY NEWBERRY, ROY GREEN, J.D. HILL, KEITH VAN HORNE, RON STONE, RON PRITCHARD, JAMES MCMAHON, MARCELLUS WILEY, and JONATHAN REX HADNOT, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

NATIONAL FOOTBALL LEAGUE, a New York unincorporated association,

Defendant.
/

No. C 14-02324 WHA

ORDER GRANTING MOTION TO DISMISS

INTRODUCTION

In this putative class action alleging improper administration of pain medications to professional football players, defendant moves to dismiss plaintiffs' third amended complaint. For the reasons stated below, the motion is **GRANTED**.

STATEMENT

This motion is the latest in a series of lawsuits arising out of defendant National Football League's (NFL) alleged "return-to-play" scheme in which former players were given painkillers indiscriminately in an effort to quickly return players back to the game and maximize profits, despite the players' lingering physical injuries.[1]

[1] A separate putative class action against the individual clubs involving the same alleged conduct, *Evans v. Arizona Cardinals Football Club, LLC*, No. C 16-01030 WHA, was filed on May 21, 2015 (and transferred to the undersigned judge on March 1, 2016) while the instant action was on appeal.

A prior order set forth in detail the well-pled background facts, assumed to be true for purposes of the present motion (Dkt. No. 106). In brief, the NFL is an unincorporated association of thirty-two separately-owned and independently-operated professional football "clubs" or teams across the country. Named plaintiffs are ten retired players who played for a number of those individual football teams at various points in time.

In May 2014, plaintiffs filed the instant putative class action, alleging that they were supplied an endless stream of powerful pain medications, such as opioids, Toradol, local anesthetics, and combinations thereof, in order to return players back to the game as quickly as possible instead of allowing them to rest and heal properly from serious football-related injuries. The medications were distributed, plaintiffs alleged, without proper prescription, documentation, or disclosure of the medical risks and side effects, in violation of various laws. Plaintiffs then asserted nine claims against the NFL in their second amended complaint — including claims for negligent misrepresentation, negligence *per se*, negligent hiring and retention, fraud, and fraudulent concealment (Dkt. No. 65).

The essence of the then-operative second amended complaint was that the NFL had been negligent in not doing enough to police the alleged problem of the individual clubs abusing pain medications in order to quickly return their injured players to the field. But in order to evaluate the reasonableness of the NFL's conduct towards the players, it would have been necessary to consider the long history of provisions agreed to by the NFL in collective bargaining agreements (CBA) intended to protect the players. In turn, this consideration of the CBAs triggered the preemption rule within our circuit, as exemplified by *Cramer v. Consolidated Freightways, Inc.*, 255 F.3d 683, 689–93 (9th Cir. 2001) (en banc). Accordingly, in December 2014, the Court found that the theory of liability was barred as preempted by Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185(a) (Dkt. No. 106).

In September 2018, our court of appeals reversed and remanded, holding that plaintiffs' claims neither arose from the CBAs nor required their interpretation and were thus not preempted by Section 301. It so ruled based on plaintiffs' pitch to our court of appeals that the second amended complaint alleged a "pyramidal conspiracy" — specifically, by using the club

doctors, "the NFL control[led] and direct[ed] a pyramidal scheme for the distribution of controlled substances and prescription drugs in flagrant disregard of federal and state law" (Dkt. No. 131-1 at 1–2). Plaintiffs argued that "the duty at issue [was] to obey the law" and that "[o]nce the illegality exemption [to Section 301 preemption] [was] applied, the rest of the duties flow[ed] to obey the law. You then just follow the drugs" (*id*. at 5, 8). In other words, plaintiffs argued that they alleged that the NFL *itself* supplied and distributed the endless stream of drugs, thereby violating the relevant federal and state statutes governing controlled substances.

Our court of appeals agreed with plaintiffs' reading of the second amended complaint, as demonstrated by the following exchange during oral argument between the appellate court and counsel for the NFL (*id*. at 11 (emphasis added)):

> THE COURT: Counsel, what do we do with the allegation in the complaint that the NFL directly gave drugs to athletes?
>
> MR. CLEMENT: Well, I think what you do is you read it in the context of the entire complaint, so with respect to every one of the ten plaintiffs, the specific allegations are that they were given injections by the team doctors, the doctors . . .
>
> THE COURT: I'm looking at paragraph 17 of the complaint. This is the second amended complaint, the NFL directly? *I'm going to put some ellipses in here. The NFL directly supplied players with opioids.*

This reading of the complaint drove our court of appeals' analysis. It construed the second amended complaint as "not merely alleging that the NFL failed to prevent medication abuse by the teams, but that the NFL *itself* illegally distributed controlled substances, and therefore its actions directly injured players." *Dent v. Nat'l Football League*, 902 F.3d 1109, 1118 (9th Cir. 2018) (emphasis in original). "With that reading of the complaint in mind," our court of appeals held that "to the extent the NFL is involved in the distribution of controlled substances, it has a duty to conduct such activities with reasonable care" and that the "minimum standards [of care] are established by statute," such as the Controlled Substances Act (CSA), the Food, Drugs, and Cosmetics Act (FDCA), and the California Pharmacy Laws. *Ibid*. To the extent the NFL violated those laws, a ruling on plaintiffs' claims did not require interpretation of the CBAs. *Id*. at 1118–19.

Based on the foregoing, our court of appeals held that plaintiffs' "negligence claim regarding *the NFL's alleged violation of federal and state laws* governing controlled substances [was] not preempted by [Section] 301." *Id*. at 1121 (emphasis added). Specifically, its decision noted the following.

> [Plaintiffs] alleged that since 1969, *the NFL has distributed controlled substances and prescription drugs* to its players *in violation of both state and federal laws*, and that the manner in which these drugs were administered left the players with permanent injuries and chronic medical conditions.
>
> Each team hires doctors and trainers who attend to players' medical needs. Those individuals are employees of the teams, not the NFL. But the players' Second Amended Complaint [] asserts that *the NFL itself directly provided medical care and supplied drugs to players*.
>
> The players argue that they were injured by *the NFL's "provision and administration" of controlled substances* without written prescriptions, proper labeling, or warnings regarding side effects and long-term risks, and that *this conduct violated the Controlled Substances Act*, 21 U.S.C. § 801 *et seq*.; the Food, Drugs, and Cosmetics Act, 21 U.S.C. § 301 *et seq*.; and the California Pharmacy Laws, Cal. Bus. & Prof. Code § 4000 *et seq*.
>
> [A]s we read the complaint, the plaintiffs are not merely alleging that the NFL failed to prevent medication abuse by the teams, but that *the NFL itself illegally distributed controlled substances*, and therefore its actions *directly* injured players.
>
> [Plaintiffs] are not arguing that the NFL violated the CBAs at all, but that it *violated state and federal laws* governing prescription drugs.
>
> But when it comes to the distribution of potentially dangerous drugs, minimum standards are established by statute. The Controlled Substances Act, 21 U.S.C. § 801 *et seq*.; the Food, Drugs, and Cosmetics Act, 21 U.S.C. § 301 *et seq*.; and the California Pharmacy Laws, Cal. Bus. & Prof. Code § 4000 *et seq*., set forth requirements governing how drugs are to be prescribed and labeled. Therefore, under the plaintiffs' negligence per se theory, *whether the NFL breached its duty to handle drugs with reasonable care can be determined by comparing the conduct of the NFL to the requirements of the statutes at issue*.
>
> As for causation, whether *the NFL's alleged violation of the statutes* caused the plaintiffs' injuries is a purely factual question that does not require a court to interpret any term of a collective-bargaining agreement.
>
> But the *teams'* obligations under the CBAs are irrelevant to the question of *whether the NFL breached an obligation to players by violating the law*. The parties to a CBA cannot bargain for what is illegal. Therefore, liability for a negligence claim alleging *violations of federal and state statutes* does not turn on how the CBAs allocated duties among the NFL, the teams, and the individual doctors.

> Regardless of what (if anything) the CBAs say about those issues, if the NFL had any role in distributing prescription drugs, it was required to follow the laws regarding those drugs. *To the extent that the plaintiffs allege they were injured by the NFL's violation of those laws*, their claims can be assessed without any interpretation of the CBAs.
>
> We express no opinion regarding the merits of the plaintiffs' negligence claim, which will require the players to *establish that the relevant statutes apply to the NFL, the NFL violated those statutes, and the alleged violations caused the players' injuries*. Perhaps plaintiffs can prove these elements; perhaps not. That must await completion of discovery. We hold only that the plaintiffs' negligence claim regarding the NFL's alleged violation of federal and state laws governing controlled substances is not preempted by § 301.
>
> In other words, the fact that the CBAs require team doctors to advise players in writing if a medical condition could be significantly aggravated by continued performance does not address *the NFL's liability for injuring players by illegally distributing prescription drugs*.

Id. at 1114–15, 1118–21 (citations and internal quotation marks omitted) (original alterations omitted) (emphasis added).

Our court of appeals explicitly limited its holding to the issue of preemption and further observed that it was still to be determined on remand "whether the plaintiffs have pleaded facts sufficient to support" their negligence claim. *Id*. at 1121. And, it warned plaintiffs against "conflat[ing]" actions by the club doctors and trainers from those of the NFL, as plaintiffs are "limited to claims arising from the conduct of the NFL and NFL personnel." *Ibid*.

In October 2018, after remand, plaintiffs were granted leave to amend their complaint (Dkt. No. 118). In December 2018, plaintiffs filed a third amended complaint (Dkt. No. 119). This constitutes their "best and final" pleading (Dkt. Nos. 117 at 1; 118). Now that the dust has settled after a trip to our court of appeals and the completion of the *Evans* litigation, only a single claim for negligence remains (Third Amd. Compl. ¶¶ 298–310).[2]

The NFL now moves to dismiss under Rule 12(b)(6) on the grounds that (1) plaintiffs fail to adequately plead their sole negligence claim, and (2) the claim is time-barred. Plaintiffs counter by asserting that they "have identified three common law duties owed by the NFL" (Opp. 12). This order follows full briefing and oral argument.

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[2] The last leg plaintiffs stand on at this point in the instant litigation is a negligence claim, despite having "conceded from the very beginning that the intentional torts are [their] strongest argument" and that the negligence claims "are the weaker argument" (Dkt. No. 131-1 at 22).

ANALYSIS

"To state a claim for negligence in California, a plaintiff must establish the following elements: (1) the defendant had a duty, or an 'obligation to conform to a certain standard of conduct for the protection of others against unreasonable risks,' (2) the defendant breached that duty, (3) that breach proximately caused the plaintiff's injuries, and (4) damages." *Dent*, 902 F.3d at 1117 (citing *Corales v. Bennett*, 567 F.3d 554, 572 (9th Cir. 2009)).

In sum, plaintiffs now allege as follows (Third Amd. Compl. ¶ 16):

> The NFL was required to, or voluntarily undertook the duty to, comply with federal and state laws regulating the manner in which these Medications were administered and distributed. It failed to do so, consistently and repeatedly, from the 1970s through at least 2014 and that failure directly and proximately caused the injuries for which Plaintiffs seek damages.

As noted above, plaintiffs previously convinced our court of appeals that the "essence" of their claims in the second amended complaint was not only the NFL's alleged failure to prevent medication abuse, *but also that the NFL itself handled, distributed, and administered the medications*. *Dent*, 902 F.3d at 1118. Under this reading of plaintiffs' negligence *per se* theory, our court of appeals held that the NFL's *direct* involvement in the handling, distribution, and administration of the controlled substances gave rise to a duty of care. *See id*. at 1119.

Plaintiffs now argue that they have plausibly alleged conduct showing that the NFL owed an independent duty to plaintiffs based on (1) the nature of the NFL's alleged conduct; (2) the NFL's alleged voluntary undertaking of the drug program created to monitor the handling and distribution of the controlled substances; and (3) the "special relationship" allegedly existing between the NFL and its players (Opp. 8–11). This order disagrees and finds that plaintiffs have failed to adequately plead the requisite elements of negligence under Rule 12(b)(6).

1. NATURE OF THE ACTIVITY AT ISSUE.

Here, plaintiffs primarily rely on a negligence *per se* theory to support their negligence claim (as they did in their second amended complaint), which is "a presumption of negligence aris[ing] from the violation of a statute which was enacted to protect a class of persons of which the plaintiff is a member against the type of harm which the plaintiff suffered as a result of the violation of the statute." *Hoff v. Vacaville Unified Sch. Dist.*, 19 Cal. 4th 925, 938 (1998); *see*

also CAL. EVID. CODE § 669. "[A]n underlying claim of ordinary negligence must be viable before the presumption of negligence . . . can be employed." *Cal. Serv. Station & Auto. Repair Ass'n v. Am. Home Assurance Co.*, 62 Cal. App. 4th 1166, 1178 (1998). The "presumption of negligence applies only after determining that the defendant owes the plaintiff an independent duty of care." *Id*. at 1180.

As plaintiffs acknowledge, our court of appeals held that "the NFL owed a duty to [p]laintiffs because [of] the general character of the conduct at issue, *assuming, in fact*, the NFL engaged in the handling, distribution and administration of [m]edications" (Opp. 8 (citing *Dent*, 902 F.3d at 1119) (emphasis added)). Plaintiffs argue that they have adequately alleged such conduct by the NFL. This order disagrees.

Plaintiffs now explicitly base their claim that the NFL was directly involved in the handling, distribution, and administration of controlled substances on the NFL's supposed "role in the creation, implementation and maintenance of" an alleged "Return to Play Business Plan" (*id*. at 2). The "general character of" the NFL's maintenance of this "Business Plan" and "its involvement in the distribution of the Medications violate the" CSA and FDCA, according to plaintiffs (*id*. at 13). Specifically, they argue that but for the supposed "Business Plan," "*Club doctors and trainers would not have violated drug laws and regulations* regarding controlled substances and prescription drugs" (*id*. at 2 (emphasis added)).

By their own admission then, plaintiffs do not allege that the NFL *itself* violated the relevant drug laws and regulations governing the medications at issue — that violation is specifically attributed to the club doctors and trainers.[3] Plaintiffs attempt to handwave this

[3] Yet plaintiffs continue to conflate conduct by the NFL and the individual clubs by sporadically labeling relevant actors as "NFL doctors and trainers" throughout the third amended complaint, despite our court of appeals' warning. *See Dent*, 902 F.3d at 1121 ("We do note that at many points in the [second amended complaint], the plaintiffs appear to conflate the NFL and the teams. But the plaintiffs are pursuing a theory of direct liability, not vicarious liability. And they have attempted to vindicate virtually identical claims against the clubs themselves in separate litigation. Therefore, on remand, any further proceedings in this case should be limited to claims arising from the conduct of the NFL and NFL personnel — not the conduct of individual teams' employees.").

The totality of the allegations renders this conclusory label implausible. That is, even taking all allegations as true, it cannot be reasonably inferred that the doctors and trainers directly distributing the drugs allegedly in violation of the relevant statutes were NFL personnel. For example, plaintiffs allege that the NFL

deficiency as a mere technicality, asserting that "it matters not who actually put a pill in a player's hand, but rather, how it came to be that, despite a comprehensive and thorough regulatory scheme designed to prevent the abuses at issue, those abuses nonetheless occurred" (*ibid.*). They try to shore up a direct liability claim by pointing to various allegations within the third amended complaint to argue that the NFL is "controlling all of this" (Dkt. No. 134 at 44:10–11; Opp. 3–4). For example, plaintiffs allege that the NFL "compiled weekly injury reports and required reports from teams on the volume of drugs they [the clubs] were distributing to their players"; it "mandated that the Clubs have locked drug storage areas at their facilities"; it "approved Club financial arrangements with doctors and medical groups"; it "established committees to discuss and oversee the distribution of Medications"; it "conduct[ed] on-site inspections of the Clubs' facilities to ostensibly determine compliance with the laws identified in" the third amended complaint; and it "sponsored League-wide studies on the effects of certain Medications" (Opp. 2–3; Third Amd. Compl. ¶¶ 159, 163–72, 178–80, 188–96). Plaintiffs thus contend that the NFL was involved in "every aspect" of the players' medical care — except for the actual distribution of the controlled substances (Dkt. No. 134 at 44:14–15).

As the NFL points out, however, this distinction is dispositive. Significantly, plaintiffs do not make any specific, plausible allegation that the relevant statutes apply to the NFL, let

---

"has distributed these controlled substances and prescription medications with little to no regard for the law or the players' health" and label the relevant actors "NFL doctors and trainers" (Third Amd. Compl. ¶ 7). To support this contention they allege in the very next sentence that "*Raiders owner Al Davis* routinely pressured players and doctors to do anything to get a player back on the field, regardless of the risks" and that "as the position of *Club* doctor and trainer have become increasingly lucrative, the pressures on the medical personnel to return players to the field have only increased" (*ibid.* (emphasis added)). But these factual allegations refer to an *individual team's* actions, *not* the NFL's. The third amended complaint is replete with numerous other factual allegations similarly undercutting plaintiffs' conclusory allegations of the NFL's direct distribution of the medications (*see, e.g.*, *id.* ¶¶ 21, 30, 39, 47, 58, 67, 77, 86, 96). Nor can plaintiffs' reliance during oral argument on Dr. Pellman's alleged dual role as New York Jets' doctor and NFL medical advisor give rise to this inference, as his alleged violations of the relevant laws and regulations were made in his "capacity as a *team* doctor" (*id.* ¶ 216 (emphasis added)).

The conflation is made all the more evident by plaintiffs' contention that the "relationship [between the NFL and the clubs] is complicated and, without discovery, it will not be entirely clear . . . what exactly that relationship is, and concomitantly, what that may mean for this case" and their musing that "although the NFL and the clubs are independent legal entities, there is more to the puzzle" (Opp. 4). At bottom, the fact remains that the NFL and the clubs, while closely related, *are* separate entities, and plaintiffs' plain assertion that the NFL is the clubs' "super-employer" is insufficient to conjure up a direct (rather than a vicarious) liability claim (*see* Opp. 5).

alone that the NFL violated those statutes. Despite ninety pages of allegations (largely directed to the clubs' conduct), nowhere in the third amended complaint do plaintiffs allege, as they previously pitched before our court of appeals, that the NFL undertook to provide direct medical care and treatment to players such that its conduct violated any relevant drug laws. Though plaintiffs generally contend that the NFL controlled and directed the distribution of the players' medication via the "Business Plan," nowhere in the third amended complaint do plaintiffs specifically allege any facts as to how the NFL instructed the club doctors' handling, distribution, and administration of the drugs or otherwise forced the club doctors to violate any relevant drug laws. (In fact, the conduct by the NFL that plaintiffs *do* specifically allege largely relate to its efforts to help the clubs *comply* with those statutes (*see, e.g.*, Third Amd. Compl. ¶¶ 159–82)).

Our court of appeals previously found that the NFL owed a duty (and the claims were not preempted) where plaintiffs alleged that the NFL was directly "involved in the distribution of controlled substances" based on "the general character of [that] activity." *Dent*, 902 F.3d at 1119 (citation and quotations omitted) (alterations in original). It further explained that plaintiffs' negligence claim "will require the players to *establish that the relevant statutes apply to the NFL, the NFL violated those statutes*, and the alleged violations caused the players' injuries" and that it "le[ft] it to the district court to determine whether the plaintiffs have pleaded facts sufficient to support their negligence claim against the NFL." *Id*. at 1121 (emphasis added). Plaintiffs now acknowledge in their third amended complaint and briefing that the NFL did not itself provide medical care for or distribute medications to the players, and the operative complaint contains only conclusory allegations related to conduct by the NFL that would give rise to a duty of care. This order therefore finds that plaintiffs failed to plead sufficient facts that, if proved, would support their negligence claim against the NFL.

Instead, plaintiffs ultimately accuse the NFL of doing nothing despite awareness of the alleged conduct by club doctors and trainers (Third Amd. Compl. ¶¶ 66–71). For example, the first sentence of the section titled "Despite the Foregoing, the League Did Nothing" states as follows: "One of the most striking aspects of the audit program described above is that, despite

the thousands of pages of documented *illegal violations engaged in by all the clubs*, there [was] no follow up from the League" (*id.* ¶ 213 (emphasis added)). But the NFL's alleged failure to act echoes the exact theory already found preempted by Section 301 — namely, that the NFL failed to intervene in the *club's* implementation of the supposed "Business Plan" (a ruling which our court of appeals left undisturbed). As the Court previously held,

> To determine what the scope of this supervisory duty was, and whether the NFL breached it, the Court would need to determine . . . what the NFL, through the CBAs, required of the individual clubs and club physicians. The NFL's overarching duty would then depend on the extent to which the various CBAs required the clubs to protect the players' medical interests. It would thus be impossible for the Court to analyze whether the NFL acted negligently, and whether the NFL's conduct caused the players' injuries, without consulting the specific CBA provisions that cover the individual clubs' duties to the players.

(Dkt. No. 106 at 13–14). This was effectively confirmed when the Court asked plaintiffs' counsel directly for an instance when the NFL violated a relevant statute during oral argument (Dkt. No. 134 at 48:16–49:11):

THE COURT:	Give me what you would say is your best example of an NFL employee violating the Controlled Substances Act.
MR. CLOSIUS:	When they are telling people to distribute it illegally. Your Honor, the —
THE COURT:	Where is that —
MR. CLOSIUS:	Let me rephrase that. The Third Amended Complaint is replete with people telling the NFL that what's happening is illegal. The DEA is doing it. The Matava report is doing it. They are being told all through about illegal dispensation of controlled substances.
THE COURT:	By who? By the Clubs?
MR. CLOSIUS:	By the Clubs.
THE COURT:	Okay. That's not the same though. Let's say that the — let's say the — somebody is telling the NFL, Hey, the Clubs are violating the Controlled Substances Act. That's not the same as the NFL itself violating anything.
MR. CLOSIUS:	Well, they never did anything to remedy it.
THE COURT:	Well, that's the original theory.

Counsel then tried to pivot by next arguing that an NFL associate stated that the NFL had "joint culpability on this" issue (Dkt. No. 134 at 49:12–50:12; Third. Amd. Compl. ¶ 11). This general "admission" of joint culpability, however, could easily refer to some general moral sense of culpability, not necessarily a legal culpability under the CSA or other relevant drug law. And, mere allegations that the NFL paid for surveys and reports and did nothing despite being told of the illegal distribution of medications by the clubs do not raise the reasonable inference that the NFL *mandated* their illegal distribution such that the NFL itself is culpable under the relevant statutes. The NFL's alleged pressure on the clubs to return players to play as soon as possible does not sufficiently support plaintiffs' allegation that the NFL was directly involved in the clubs' distribution of the medications such that it owed a duty to plaintiffs or violated any relevant statutes. To repeat, plaintiffs escaped preemption before our court of appeals by asserting the NFL's *proactive* involvement with medication distribution. Having convinced our court of appeals that they were alleging that the NFL itself directly provided medical care and supplied drugs to players, plaintiffs may not bob and weave back to old theories of negligence that, in essence, amount to the NFL's failure to intervene.

Plaintiffs complain that the NFL focuses only on our court of appeals' use of the word "distribute" as literally defined in the CSA. They suggest that because our court of appeals used the word "handle" elsewhere in *Dent* (a word that plaintiffs assert is *not* used in either the CSA or FDCA), the appellate court's choice of words "may not have been that precise" because it "us[ed] all kinds of phrases" (Dkt. No. 134 at 46:15–25). As such, plaintiffs aim for a broader interpretation of liability allowed under *Dent* to include the NFL's alleged activities beyond those governed by the relevant drug statutes, such as recordkeeping and storage. Not so. Though *Dent* arguably leaves room to find the NFL liable even if it is not physically handing out drugs to players itself, the clear import of *Dent* centers on the NFL's alleged provision of medical care to the players and *direct distribution* (at least, under the NFL's specific direction) of the medications *in violation of the relevant statutes*.

To repeat, as our court of appeals understood the second amended complaint, plaintiffs were "not merely alleging that the NFL failed to prevent medication abuse by the teams, but that

the NFL itself illegally distributed controlled substances, and therefore its actions directly injured players." *Dent*, 902 F.3d at 1118 (emphasis added). Plaintiffs were "not arguing that the NFL violated the CBAs at all, but that *it violated state and federal laws governing prescription drugs*." *Ibid*. Again, it noted that "[t]he players argue[d] that they were injured by *the NFL's 'provision and administration' of controlled substances* without written prescriptions, proper labeling, or warnings regarding side effects and long-term risks, and that *this conduct violated the Controlled Substances Act*, . . . *the Food, Drugs, and Cosmetics Act*, . . . and *the California Pharmacy Laws*. . . ." *Id*. at 1118 (emphasis added).

In answering the question of whether plaintiffs' negligence claim in the second amended complaint required interpretation of the CBAs, our court of appeals noted, *inter alia*, that "when it comes to the distribution of potentially dangerous drugs, *minimum standards are established by statute*," such as the CSA, FDCA, and California Pharmacy Laws, which "set forth requirements governing how drugs are to be prescribed and labeled." *Id*. at 1119 (emphasis added). As such, under plaintiffs' negligence claim, "whether the NFL breached its duty to handle drugs with reasonable care can be determined by *comparing the conduct of the NFL to the requirements of the statutes at issue*." *Ibid*. (emphasis added). Our court of appeals further noted that "[a]s for causation, whether the NFL's alleged *violation of the statutes* caused the plaintiffs' injuries" is a question that does not require the interpretation of the CBAs. *Id*. at 1119–20 (emphasis added). The clubs' "obligations under the CBAs [we]re irrelevant to the question of whether *the NFL breached an obligation to players by violating the law*" and therefore "liability for a negligence claim alleging *violations of federal and state statutes* d[id] not turn on how the CBAs allocated duties among the NFL, the teams, and the individual doctors." *Id*. at 1121 (emphasis added). "[I]f the NFL had any role in *distributing prescription drugs*, it was *required to follow the laws regarding those drugs*." *Ibid*. (emphasis added).

Our court of appeals thus clearly reversed (on the preemption issue) based on plaintiffs' prior representations related to the NFL's direct involvement in the handling, distribution, and administration of the medications *within the meaning of the relevant drug statutes*. Now that plaintiffs have apparently abandoned these allegations in the third amended complaint —

perhaps in response to discovery in the *Evans* litigation — this order finds that they have failed to sufficiently allege that the general character of the NFL's conduct gave rise to a duty of care owed to the players (or that the NFL breached its duty).

2. VOLUNTARY ASSUMPTION.

Plaintiffs next argue that the NFL voluntarily assumed a duty to ensure the clubs' compliance with the aforementioned drug laws (Opp. 9). This order disagrees.

"The negligent undertaking theory of liability holds that a person who has no affirmative duty to act but voluntarily acts to protect another has a duty to exercise due care if certain conditions are satisfied." *Univ. of S. California v. Superior Court*, 30 Cal. App. 5th 429, 448 (2018) (citing *Delgado v. Trax Bar & Grill*, 36 Cal. 4th 224, 249 (2005); *Paz v. State of California*, 22 Cal. 4th 550, 558 (2000)). "The undertaking must be to render services that the defendant should recognize as necessary for the plaintiff's protection. . . . [T]he plaintiff also must satisfy one of two conditions: either (a) the defendant's failure to exercise reasonable care increased the risk of harm to the plaintiff, or (b) the plaintiff reasonably relied on the undertaking and suffered injury as a result." *Id*. at 448–49 (citations omitted).

Plaintiffs assert that "the NFL voluntarily involved itself in the distribution of Medications to its players" by setting up a drug program designed to monitor the clubs' compliance with the aforementioned drug laws (Opp. 9). Notwithstanding plaintiffs' simultaneous insistence that the NFL did *nothing* to protect the players (*see, e.g.*, Third. Amd. Compl. ¶¶ 213–29), plaintiffs contend they have adequately pled the assumption of the NFL's duty based on the "various means" alleged, such as "the imposition of Club audits, League-wide policies related to Toradol, and the security and handling of Medications" (Opp. 9). But plaintiffs have not specifically alleged how the NFL's conduct *increased* the risk of harm to plaintiffs. "A defendant does not increase the risk of harm by merely failing to eliminate a preexisting risk." *Univ. of S. California*, 30 Cal. App. 5th at 450. Nor have plaintiffs alleged any specific facts as to their reasonable reliance on the NFL's supposed assumption of duty or their suffering of injury as a result of the NFL's conduct. Accordingly, plaintiffs have failed to adequately plead an assumption of duty by the NFL.

3. SPECIAL RELATIONSHIP.

Finally, plaintiffs argue that the NFL owed a duty because of the " 'special relationship' that intertwines the NFL, the Clubs, and players" (Opp. 10).

"Special relationships" giving rise to a duty may exist where there is an "aspect of dependency in which one party relies to some degree on the other for protection." *Regents of Univ. of California v. Superior Court*, 4 Cal. 5th 607, 620 (2018) (citing *Baldwin v. Zoradi*, 123 Cal. App. 3d 275, 283 (1981); *Mann v. State of California*, 70 Cal. App. 3d 773, 779–80 (1977)). "The corollary of dependence in a special relationship is control. Whereas one party is dependent, the other has superior control over the means of protection." *Id.* at 621. Furthermore, "a typical setting for the recognition of a special relationship is where 'the plaintiff is particularly vulnerable and dependent upon the defendant who, correspondingly, has some control over the plaintiff's welfare.' " *Ibid*. (quoting *Giraldo v. Dep't of Corrs. & Rehab.*, 168 Cal. App. 4th 231, 245–46 (2008)). Classic examples include jailer-prisoner and common carrier-passenger relationships. *Ibid*. (citing *Giraldo*, 168 Cal. App. 4th at 245–46; *Lopez v. Southern Cal. Rapid Transit Dist.*, 40 Cal. 3d 780, 789 (1985)).

As an initial matter, plaintiffs fail to allege this "special relationship" in their third amended complaint. This order thus need not consider this argument.

Moreover, plaintiffs fail to sufficiently persuade that the relationship between the former players — who were compensated adult professional athletes with collectively bargained rights over their medical care — and the NFL is analogous to that of the relationship between students and their colleges. Plaintiffs' reliance on *Regents of University of California*, is therefore unavailing. There, the California Supreme Court held that colleges "have a special relationship with students while they are engaged in activities that are part of the school's curriculum." *Id*. at 624–25. In so holding, it considered "the unique features of the college environment," such as the provision of "social, athletic, and cultural opportunities" to students who are still "learning how to navigate the world as adults" and are "dependent on their college communities to provide structure, guidance, and a safe learning environment." *Ibid*. Moreover, colleges "have superior control over the environment and the ability to protect students," as "[t]hrough [their] providing

of food, housing, security, and a range of extracurricular activities" and their administrators and educators "hav[ing] the power to influence students' values, their consciousness, their relationships, and their behaviors." *Id*. at 625 (quoting *Furek v. Univ. of Delaware*, 594 A.2d 506, 516 (Del. 1991); Helen Hickey de Haven, *The Elephant in the Ivory Tower: Rampages in Higher Education and the Case for Institutional Liability*, 35 J.C. & U.L. 503, 611 (2009)).

While sympathetic to plaintiffs' position, this order is not sufficiently persuaded that the medical care plaintiffs argue the NFL provided to them renders them "particularly vulnerable" in the sense that "the unique features of the college environment" do for college students. *See id*. at 620, 624. Accordingly, plaintiffs have not sufficiently pled a special relationship giving rise to a duty owed by the NFL.

* * *

Based on the foregoing, this order finds that plaintiffs have failed to sufficiently allege any duty owed by the NFL to plaintiffs.[4]

CONCLUSION

This order again reiterates that the ruling against plaintiffs' theories herein does not minimize the underlying societal issue and the need to protect the health and safety of our professional athletes. That being said, plaintiffs failed to adequately plead their sole negligence claim and thus for the foregoing reasons, the NFL's motion to dismiss is **GRANTED**. Because this was plaintiffs' "best and final" pleading, the instant action is **DISMISSED** without further leave to amend. Judgment will follow.

IT IS SO ORDERED.

Dated: April 18, 2019.

WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE

[4] Because this order finds that plaintiffs failed to adequately plead a negligence claim, it need not and does not reach the NFL's statute of limitations argument.

ER 22

Richard Dent v. NFL
Case Number: 15-15143
Case Panel: KOZINSKI, BYBEE, N.R. SMITH
Hearing Location: San Francisco CA
Hearing Date: 12/15/2016

PJC Good morning. May it please the Court, my name is Phillip J. Closius and I represent the appellants, Richard Dent and nine other former professional football players. With the Court's permission, I would like to reserve three minutes for rebuttal.

Court You can try.

PJC Thank you. The factual allegations at the heart of this case involve a disconnect between the face of the NFL and the shallow reality that supports it. Article 39 of the Collective Bargaining Agreement, is clear that the healthcare responsibilities are placed on the Club and that the NFL has no duties or obligations of healthcare to the players under the CBA. However, as pled and presumed to be true, the NFL controls and directs a pyramidal scheme for the distribution of controlled substances and prescription drugs in flagrant disregard of federal and state law. The NFL is attempting to use the words of the CBA to shield its illegal activity.

Court Sounds like a RICO case to me.

PJC Your Honor, it may be except we only have one defendant here.

Court I, uh, na, na, huh?

PJC We only have one defendant here.

Court Na, I'm sorry?

PJC We only have one defendant here. I believe RICO requires more than one defendant.

Court Well, sometimes you have a RICO case that's not a RICO case because you don't have enough defendants.

PJC Exactly, Your Honor, it's a similar thing. It's a pyramidal conspiracy (inaudible).

Court I mean your pleading, your pleading as a tort case, right?

PJC As a tort case? Correct.

Court Yeah.

PJC Intentional and negligent.

Court So the question is whether or not the standard of care is derived from the CBA or not. Where does it come from?

PJC We don't reference the CBA, we will never use the CBA, we are not involved with any duties under the CBA. As I just said, the NFL has none. Article 39 is clear that the NFL has no duty or obligation in healthcare under the CBA. The major issue for this Court to decide which is where the standard of care comes from, is did the District Court err when it held that the illegality exception to 301 preemption only applied to state statutory claims. This illegality exemption was created by the Supreme Court now Allis-Chalmers. It was again referenced in the leading preemption case in the Ninth Circuit, *Kramer v. Consolidated Freightways*. In neither of those two cases and in no cases that we know of has this distinction be made and as far as we can tell the District Court made it sua sponte. In fact, the Ninth Circuit has repeatedly applied this illegality exemption to common law tort claims at state law also. In *Kramer v. Consolidated Freightways*, the allegations were a breach of invasion of privacy under the California Constitution and a common law claim for intentional infliction of emotional distress. In *Burnside v. Kiewit*, again we had two state law claims and a common law claim for conversion. In *Ward v. Circus Circus*,

we have all tort claims, Your Honor, intentional negligence. In *Galvez v. Kuhn*, we have…

Court Counsel, I'd like to work down through your causes of actions to see if I can simplify this just a little bit. You have nine causes of action…

PJC Correct.

Court Three of them as far as I can tell actually are remedies, the (inaudible)…

PJC They're derivative.

Court …which is the declaratory relief, the medical monitoring and the loss of consortium which is number seven. I don't see that those are really at issue here (inaudible).

PJC They're derivative, Your Honor, they're not.

Court Right, okay, so we've narrowed down to six things.

PJC Correct.

Court A couple of those sound in negligence but you have a couple of them that also, that sound in fraud.

PJC Counselor.

Court I'm sorry?

PJC Yes, Your Honor.

Court Okay, so I just want to make sure I'm right. So we've got, I got several that sounded in negligence and a couple that sound in fraud.

PJC There are three that we called, we would consider traditional negligence and then there were three, one that's negligence per se, the other that's fraud and the other's fraudulent concealment which we think are intentional torts or the equivalent thereof.

Court Okay. In the *Evans* case, Judge Alsup said that the claims against the Clubs were not preempted…

PJC Correct.

Court And then distinguished that case from this case in part by saying that in this case these were negligence claims and that characterization seems to me to be wrong.

PJC We agree with that, Your Honor.

Court Okay, so if you got, if you got intentional tort claims, don't those fall outside of the CBA and aren't those different from the negligence claims?

PJC Your Honor, we think all of them fall outside the CBA…

Court Okay, all right.

PJC … but the stronger case is clearly with negligence per se fraud and fraudulent concealment…

Court Okay, now let's…

PJC …if that's what you're asking.

Court …and let's go to the negligence, the pure negligence cases and tell me, and tell me why those survive.

PJC In negligence, the elements for negligence per se are for…

Court Well, we're not talking negligence per se now, we're talking negligence.

PJC Oh I'm sorry, I thought, I thought he asked for negligence per se.

Court He did but he, as I understood his question, he, I guess he can correct me if I'm wrong. As I understand it, he was saying negligence per se is one thing but I want to now go to the negligence claims.

Court That's what I heard.

PJC All right, I misunderstood, I'm sorry Your Honor.

Court Counsel never quite hear the questions.

PJC The negligence claims are again based on fairly simple tort theory…

Court This will be negligence mis… misrepresentation negligent hiring and negligent retention?

PJC Correct.

Court Okay, now tell my why those survive.

PJC Because the duty at issue is to obey the law. Again, the illegality exemption applies here. It applies to common law claims. *Evans* confirmed that. It held only…

Court If only you alleged that in your complaint.

PJC I'm sorry, where do we allege…

Court Where did you allege that in your complaint? When I read your complaint, it seems to me the negligent hiring, negligent retention, negligence claim itself do not harken back to a violation of the law but instead harken to a common law duty.

PJC Your Honor, the duty to obey the law is alleged in paragraph 345 and paragraphs 370 to 380 and it does come from a common law duty, Your Honor, it's in Restatement 368.

Court Doesn't that pretty much blow Section 301 out of the water? I mean anytime you can claim a breach of duty of the Collective Bargaining game, this is where you also have a duty to follow the law.

PJC Your Honor, …

Court And so, you know, I'm not sure how that can possibly add to your claim.

PJC If the underlying action is illegal, it can't be validated by a clause in the CBA.

Court Well, but…

PJC The CBA can't make legal that which is illegal.

Court What we're trying to do is determine if there's a distinction, if you will, between your common law claims which you allege in everything except the negligence per se claim, you ex…, not only do you allege the negligence per se but you allege the statutes breached. When you get to the other parts of your complaint, you do not. You just say there's a common law duty which arises and the common law duty which arises is what we're really talking about. I don't see that's alleged from a statute, if it is, it's part of the negligence per se. It's just a common law duty that might have been breached.

PJC Your Honor, in the complaint there are three duties that are alleged. One is to obey the law, the other is reasonable care to prevent foreseeable damages and the third is the duty to use due care in hiring and retention. That last one is from *Ward*, the other two are in the Restatement. The two and three, the last two do apply only to the negligence claims what I call, not the negligence per se and not the fraud and the fraudulent concealment. But in defining the duty under those two standards, the duty that incorporates the illegal activity.

Court Well, let's talk about hiring a supervision right? Where does that duty come from?

PJC The common law. The NFL is involved in the hiring process by directing its…

Court Why is it not covered by the Collective Bargaining Agreement?

PJC Because Collective Bargaining Agreement says the NFL has no duties or obligations under healthcare and any hiring in the Collective Bargaining Agreement is placed on

the Clubs but this is a world where what's said is different from what happens. That's what we've alleged.

Court Well, would…

PJC That the pyramidal scheme exists outside the Collective Bargaining Agreement. The Bargaining Agreement says one thing, it says the NFL is not involved in any of this stuff. The reality is is the NFL is directing and controlling the illegal distribution of the drugs in a classic pyramid scheme and, Your Honors, what happens in a classic pyramid is everybody blames somebody else. Right, the NFL says it's the Clubs' duties, the Clubs say it's the doctors' duties, the doctors say it's the trainers' duties and then the trainers go right back up again. That's why pyramid schemes have been in existence for thousands of years, Your Honor, because they confuse duties, they confuse responsibilities and everybody's got plausible denial to someone else. This complaint is asking you to see through that and to allow us to hold responsible the people who are, who have controlled and directed this scheme for 45 years, from 1969 until 2012, the applicable time period in the complaint. Hundreds of Club doctors and hundreds of Club trainers have acted illegally and in violation of their ethics. The NFL would like you to believe that every one of those people independently arrived at that conclusion on their own. Our suggestion is that's just a classic pyramid scheme justification.

Court Well…

PJC The reality is is this has been directed continually by the NFL for profit, for getting players back on the field, for allowing us to have Thursday night games, for allowing

us to have our stars, it's all dependent on this distribution of drugs illegally. Without that they can't do it.

Court You're down to five minutes.

PJC Thank you, Your Honor.

Court You want to save or you want to proceed?

PJC I will save at the three minute mark if that's okay with you.

Court Oh, I'm sorry, I thought you said five minutes. I was just reminding you, you can take as long as you want.

PJC Okay, thank you.

Court Until it gets down to zero.

Court So let me get back to what you just said. If we go to negligent hiring, you say it's not derived from the CBA, it's a state common law claim but under *Caterpillar*, isn't my next question then is this kind substantially dependent on the analysis of the CBA?

PJC *Ward v. Circus Circus* answered that question negative, Your Honor. It said that you have a negligent hiring claim if the employer is not teaching its hires not to violate the law. That was assault and battery claim with security guards.

Court Oh, your answer is *Ward*?

PJC Correct. Your Honors, the District Court erred in not holding its illegality exception applicable to our common law claims which changed in *Evans v. Arizona*, which is the correct result. Once the illegality exemption is applied, the rest of the duties flow to obey the law. You then just follow the drugs. Your Honors, we understand that we either have to prove our case or we can't ever reference the Collective Bargaining Agreement. We have no intentions at any point in here to reference the Collective

Bargaining Agreement. If we can't prove our case or if we can only prove it based on the Bargaining Agreement, they're free to argue preemption in any point in time including after a jury decision. So we're only asking here for the right to discovery. We're asking for the right to get to the heart of the matter and find out who in fact is responsible for the illegal distribution of drugs that's occurring on a daily basis in the National Football League. Thank you, Your Honor, we'll reserve the rest for rebuttal.

Court Okay, we'll hear from the other side. I guess the one defendant.

Clement Morning, Your Honor, it's Paul Clement for the appellees. As the District Court correctly concluded, the plaintiff's common law claims are precluded under Section 301 because they all require interpretation of the CBAs that provide the critical link between the plaintiffs in this case…

Court This is a little unusual in that for most of these agreements NFL is not a party to the CBA. Usually in Section 301 cases we, the question is here's a party whose rights are governed by the CBA or affected or set standards are set but as I understand it, six out of seven agreements the NFL is not even a party, right?

Clement That's right, Your Honor, but I don't think that fundamentally changes the analysis in the following respect.

Court When…

Clement We're not talking about somebody who's a stranger to the Collective Bargaining process. The League oversees the 32 Clubs. There is a multiemployer bargaining unit that really is, you know, reflective of the Clubs so it's not like they've sued me and I'm like a stranger to this whole process and then they probably wouldn't be able to bring their claim, they'd lose on the merits but there wouldn't be a preemption

basis. They're clearly suing a defendant and are leapfrogging over the most obvious defendant for what they're complaining about and I, and I don't think you…

Court That's called complying with federal law. I mean you can't sue the one, you know, you leapfrog over the one you're not allowed to sue, what's wrong with that?

Clement It, they've leapfrogged over the one they clearly can't sue but they've still managed to land on somebody they can't sue either and let me explain why. First of all, remember the context here. You have unionized employees who are complaining about the fact that they were given illegal substances, they say, or prescription drugs without prescription by what they just said were Club trainers and Club doctors, employees and agents of their employer. Now in that context, if they were to sue their employers, I would think it'd be pretty obvious for negligence or fraud, I'll get to that in a minute, I think it would be pretty obvious that you'd have to interpret the Collective Bargaining Agreement. You don't solve that problem if you essentially name as the defendant kind of the super-employer and the reason is man-, there are a couple of reasons why that's the case. First of all, in allocating the duty and trying to allocate a common law duty to the NFL and not the Clubs, you have to confront the reality that there's a Collective Bargaining Agreement that assigns that precise responsibility to the Clubs.

Court But that would be an argument that you've sued the wrong party and that's a different kind of claim than one that says all of this is preempted.

Clement I don't think that's right, Your Honor, I mean I agree they, they're, it's maybe both at the end of the day that they've sued the wrong party but in order to allocate the responsibilities and also remember you got to show proximate causation. In order to

figure out whether or not that party is responsible, you have to look into the duties that are assumed by the Clubs.

Court Counsel, what do we do with the allegation in the complaint that the NFL directly gave drugs to athletes?

Clement Well, I think what you do is you read it in the context of the entire complaint, so with respect to every one of the ten plaintiffs, the specific allegations are that they were given injections by the team doctors, the doctors…

Court I'm looking at paragraph 17 of the complaint. This is the second amended complaint, the NFL directly? I'm going to put some ellipses in here. The NFL directly supplied players with opioids.

Clement Right, I think that to…

Court I mean I, this is a little incredulous to me but I, it seems to me that the, they've alleged it and if they can prove that, I don't see why that's preempted by the CBA.

Clement Well, again, I mean look, if they want to isolate their whole complaint to being the, you know, the direct distribution of opioids by the NFL, not through the Club trainers and the Club doctors, I mean I think what they would then perhaps have is a claim that just is fanciful. But that's, I don't think that's a fair reading of what they actually alleged in their whole complaint if you take it as a whole and I think if you go back and you…

Court I'm sorry, I think this is where you're going but they're not in fact alleging this is independent, they are in fact alleging that they use the Club doctors but why does the type use the Club doctors bring this under the Collective Bargaining Agreement?

Clement Because then under a negligence claim you would have to understand the duties of the League and you would have to figure out whether they really had a duty to provide, I mean you know, at the end of the day the idea that the League had a duty to provide written prescriptions for all of this when they're being directly administered by the team doctors and the team trainers. I don't see how you could say that they, you could understand whether that duty was really allocated to the League without interpreting the Collective Bargaining Agreement. I don't see how you could determine how there is proximate causation in what the League did when you have a Collective Bargaining Agreement that specifically says that it's the doctors' decision to use proper medical care. It's the…

Court Okay, so, you know, I think they take that as a given so the Collective Bargaining Agreement says the doctors have certain duties and in the (inaudible) thing there was this outside force that is causing the doctors to breach their duty and we're not suing the doctors for the breach of duty, we're suing this outside force for causing the doctors to do these terrible things.

Clement And I don't…

Court Why is that governed by the Collective Bargaining Agreement?

Clement Because ultimately in understanding what under the common law the duty of the League is to the players.

Court Well, let's put it in smaller terms. Let's say for example that a, and I'm making this up of course, that the wife of one of the players wants to poison him. Again I'm not referencing any real life situation, but let's posit that as a hypothetical and so she decides what she's going to do is she going to get one of team doctors and get the

team doctors to inject the player with poison rather than whatever it is that they normally give and at that, you know, after this happens the player then sues the doctor. I'm sorry, not the doctor, sues the wife or whoever this person is on the outside. Is that covered by the Collective Bargaining Agreement?

Clement I don't think that is, Your Honor, I think that's more like…

Court How is this different?

Clement Because they are not suing a random defendant, they are suing the, essentially the super-employer and in that context the super-employer, the first thing the super-employer is going to say is, what are you talking about? All this responsibility is allocated firmly on the team and the team doctors.

Court The wife would say, look, the responsibility of the doctor was to give him medicine not poison. So, you know, I…

Clement But I do think they're different and again, maybe this gets to the point, maybe there is…

Court I know you think they're different.

Clement No.

Court The point is to persuade me they're different.

Clement And well I'm going to try, Your Honor. I think they're materially different in a couple of ways. First of all, with respect to sort of the poisoning, maybe there's, you know, a nonnegotiable duty on everyone not to poison somebody so you can sue the, the wife directly. In this context what they really want to talk about are not the negligence claims, they want…

Court You know, I'm going to change the hypothetical just to avoid having you have the easy out, let's say the wife says, you know, my husband is a laggard and he just got some steroids and this is the kind of stuff given to him he'd be a better player, make more money, I could sue him, you know, I could divorce him for further settlement. So she goes to the team doctor and says, you know, just pump him up so that when he goes out there he will knock himself out and, you know, do a better job. Okay, so let's say that's what happens. You know, why, what, is there any theory under which the wife would be able to raise the Section 301 of the LMR-, you know, the…

Clement Section 301, let's call it.

Court Section 301, thank you.

Clement I don't think there is but I do think it is different when you sue somebody who is integrally involved in the Collective Bargaining process whether or not they're a signatory. If I could give you an analogy…

Court Maybe you can talk to us a little bit more cause I don't quite understand and maybe it's just because I'm not so familiar with football, what is the role of the, of your client in the Collective Bargaining process?

Clement Well, so…

Court They're not in the contract, they're not a party to the contract.

Clement No, no, I understand that but the Collective Bargaining takes place principally between the NFL Players Association and a multiemployer bargaining unit that's made up of all the NFL teams so it's technically, you know, an entity that's separate from the League but the bargaining is really taking place essentially at a League level between the NFL PA and the multiemployer bargaining association.

Court And part of the NFL MC the management committee.

Clement Yes, exactly and so as part of that back and forth they assign certain responsibilities to the Club, certain responsibilities to the players, sometimes certain responsibilities to a third party and so the idea in that context…

Court You still haven't mentioned the NFL.

Clement Well, there might be certain things that are allocated at the League level to be sure I mean and certainly things like for example, roster sizes, game schedules, that's being determined at a League level. Now…

Court No, no, I'm sorry, I don't mean to suggest that the NFL doesn't do anything, obviously it does a lot. The question is what is their involvement in the Collective Bargaining process and how are they, well, you say well, they're different from the wife because they are a super-employer. I don't see the term super-employer anywhere in the documents. It's just something you've mentioned, I mean is there something in the process or the documents that puts the NFL in some sort of different position than the officious wife?

Clement I think there is which is to say it's just essentially the mirror-image of…

Court And it made me think is what…

Clement It, it's…

Court What do you say to persuade me that there is?

Clement It's that the League is essentially the mirror-image of the multiemployer bargaining unit that's doing all these negotiations and I mean I, if you think about this…

Court I don't understand the concept of mirror-image. There is in fact a multiemployer bargaining unit here…

Clement Yes.

Court It is the Club association, whatever it's called, right?

Clement Yes, the management committee.

Court Thank you. Okay, so what does mirror-image mean and how is the NFL the mirror-image? I'm failing to understand the connection.

Clement The League is an association of 32 teams. The 32 teams directly employ the players who are or did employ the players who are the plaintiffs here.

Court You know, I, just to save your time, I do understand the structure. I do understand how these players interrelate, what I don't understand is what status or function does the NFL have in the Collective Bargaining process? They do a lot of things but they don't do everything, right? There's lots of stuff they don't do and how, you know, you say, use the term super-employer and you're they're different and, how? The context don't reference, are they involved in the…

Clement Well, they, the…

Court …Collective Bargaining, are they…

Clement …as you mentioned…

Court Do they sit at the table?

Clement The last CBA actually does mention them, you know, in hoc verba but the reason that it doesn't is because the leagues operate through the, you know, essentially through the teams as to not just, you know, wages and not just to the way that they operate but as to the specific complaint of what's going on here and it seems to me that you would be sort of blinking reality to say, oh well, the League is a complete stranger to the CBA.

Court No, so Counsel, in the 2011 CBA, the NFL is actually made a party expressly.

Clement Right.

Court Okay, so Article 39 and I'm looking at Section 3d, it says nothing in this Article or any other Article in this agreement, this is the medical section...

Clement Right.

Court …shall be deemed to impose or create any duty or obligation on either the League or NFLPA regarding diagnosis, medical care or the treatment of any player. So given that the CBA says, denies that the NFL has any responsibility to the players, how can the CBA preempt an action against them? They may have an uphill battle to prove a state law duty but this section just says, yeah, well, it certainly isn't, it certainly isn't going to come from the CBA because we've just said the NFL has no responsibilities for medical treatment of any player.

Clement Well, a couple of things, Your Honor, first of all, you're going to have to interpret the scope of that provision of the CBA to make that conclusion so right there you're interpreting the CBA. You would reinforce that conclusion by looking at well, to the, the other provisions that have been in the CBA from the beginning and you would say of course, there's no duty on behalf of the League because of the things they're complaining about are more directly assigned to the teams and the trainers and the doctors and I do want to get the point out before my time expires that as to the fraud claims, I think they're even more obviously preempted because one of the common law elements of fraud is to show reasonable or justifiable reliance. Well, how in the world is it reasonable to rely on some omission or some statement of the League when the, when you're operating in an unionized employment situation where there

are teams that are giving you advice about the exact same things more directly and the agreement gives you a collective bargained right to get a second medical opinion. So the idea that they would reasonably rely on what the League told them about the medications or that there was some sort of springing duty on behalf of the League when the Collective Bargaining Agreement itself assigns responsibilities and gives rights that would I think make that reliance completely unreasonable…

Court Counsel I'm, I have to say that I'm, was really scratching my head after I read the *Evans* decision because the same District Judge ruled here Judge Alsup took that case and said well obviously, a suit against the Clubs is not preempted and you would just think after having read this that a fortiori any suit brought against the appropriate party who actually are administering the drugs and who are bound, the Clubs who are bound by this would be preempted. But he said, well, the difference is that in *Dent* it, they're just negligence claims. Well, they're not just negligence claims, there are fraud claims. Those are intentional torts, not negligent torts.

Clement Well, but, but as I just said…

Court It makes me wonder whether Judge Alsup didn't have the courage of his convictions in the *Dent* case.

Clement No, no, I think if you give Judge Alsup his due at least in the *Dent* case, I think what he said is he did a thorough analysis of the negligence claims and then he turned to the fraud claims and he said exactly what I just said, which is the fraud claims are even more obviously preempted because you have to show reasonable or justifiable reliance and you can't do that in this context without interpreting the CBA. Now by the time he turns around in *Evans* and uses the shorthand for what he decided, I think

he, you know, maybe at one point he said they're all negligence and in another point he talked about them as being common law but in all events, his shorthand may have been a little too short but I think the *Dent* analysis correctly analyzes all of these claims. Now personally I think he got it wrong in *Evans*. I think though that he perceived this as being even more obviously preempted because this, I think he perceived this case as being a little like the Supreme Court heckler's case where when you don't sue the employer for something that is obviously the employer's duty under common law but you sue somebody less intuitive. In that case it was the Union, here it's the League. The place you would look for the assignment, the reassignment of the duty that would naturally belong to the employer is to the Collective Bargaining Agreement and the other terms that bind those parties together and that's why I do think any way you look at this, you're going to come back to a need to interpret the Collective Bargaining Agreement. If I could beg the Court's indulgence for 30 seconds and just say, I don't think the negligence per se claims are any different because under California law, first you have to show an applicable statute and the statute here directs responsibilities on physicians, on registrants, the NFL is none of those things so you'd have to allocate responsibility for those duties.

Court That sounds like a 12b6 argument, it doesn't sound like a preemption argument.

Clement I think it's both because I don't see how you can allocate that responsibility. I don't think, this isn't like *Kramer* where nobody could sort of reassign the responsibility to put a surveillance camera in. There's nothing problematic under federal law for the League to say as to these registration requirements and everything, that's your responsibility over there and you would be interpreting that. You also, the second

element of negligence per se is proximate cause and how you can figure out that it was the League's violations here that proximately caused the injury without interpreting the CBA and looking at who else had responsibilities, I think beggars belief and negligence per se just establishes a presumption of negligence anyways. You still have to show the underlying duty. Thank you for the Court's indulgence.

PJC Thank you, Your Honors. About a month ago we provided with the perfect example for this case, the Harvard Law School and a Harvard Medical School published a report questioning whether doctors in the NFL were conflicted. Who responded to the report? Jeff Miller, Vice President, NFL, not the Clubs. If that report contained intentional fraud or negligent fraud, do we really think that a provision in the Collective Bargaining Agreement would stop someone from bringing a lawsuit based on the voluntary actions that they did in responding to the Harvard claim? Of course not! It's outside the CBA. Your Honors, the CBA is clear. There's no provision on point dealing with these drugs at issue. The responsibilities are on the Club and the NFL has no duty or obligation. There's nothing to be intertwined with. There's nothing fraud claims to be interpreted with.

Court Do I understand it correctly that we'd have to create a circuit split to come out your way?

PJC No, that's not true Your Honor. There is a strong argument throughout the circuits that illegal conduct is not to be used for 301 preemption.

Court But every NFL case has come out the other way, right?

PJC Not every NFL case no, Your Honor.

Court But respond then as I…

PJC *Brown v. the NFL*? Southern District of New York decided by Judge Lynch.

Court I'm sorry, I'm talking about appellate cases.

PJC No, none of them…

Court There's another we don't…

PJC None of the allege illegality, Your Honor. None of them had an allegation of illegal conduct. Again, Judge Alsup just missed it in *Dent*. This whole idea that it doesn't apply to common law claims is just wrong. It's against the precedent. Your Honor…

Court Then respond, respond then to Mr. Clement's argument that he made at the end which I was going to ask him about where he responded before, on the negligence per se.

PJC Your Honor…

Court These suggest, I mean I don't need to, I don't need to say what his argument is to you because I'm sure you very well understood it so give a response to that argument. Why would negligence per se then not be preempted based on what he said?

PJC Your Honor, the four elements of negligence per se is there has to be a violation of a statute. The violation has to cause the injury, the injury has to be one the statute is designed to prevent and the plaintiffs have to be in a class that the statute intended to protect. We fit all four. We fit all four. It's a classic (inaudible)…

Court You got to have proximate cause. What are you going to say to that argument?

PJC Proximate cause, Your Honor?

Court Yes.

PJC It's directly related.

Court How can we determine if it's a proximate cause if we don't look at the CBA?

PJC Your Honor, the proximate cause is that the distribution of the drugs causing the injury and if there is that question, that's 12(b)(6), that's getting into the facts, Your Honor, that's dealing with…

Court Well, you're saying 12(b)(6).

PJC Correct.

Court Understand.

PJC Your Honors, I would also disa…

Court Ask the same question (inaudible).

PJC I would also disagree with learned counsel. The case law and the law reviews are clear that preemption is not appropriate with regards to intentional torts. It's more appropriate with regards to negligence. We conceded from the very beginning that the intentional torts are our strongest argument. The negligence are the weaker argument. The NFL and Judge Alsup were obsessed with the negligence claims, Your Honor, I mean he dismissed the intentional claims in less than a page. It's the intentional claims that are at the heart of this claim and Your Honors, you understand these claims are not grouped together. You're obviously free to preempt some of these and not preempt others. If you wanted to preempt the negligence claims, you can and let the intentional ones continue. It's not that there all grouped, that all six of them rise and fall together, they're all separate. Your Honors, we're asking simply for discovery. Right, if you rule in, if you affirm this decision, our case is done. If you don't, if you reverse Judge Alsup in whole or in part, we only get discovery. There's minimal prejudice to the NFL here. If we're wrong, they can bring it up at any time. If we can't prove our claims, if we rely on…

Court (inaudible)

PJC …Collective Bargaining Agreement, they can bring it up any time.

Court (inaudible) the prejudice is not a consideration in making this decision.

PJC I think justice should always be a consideration.

Court Why, I understand justice but all we're trying to do is look at what the law is and apply it. The prejudice, I appreciate your argument but I didn't find anything that suggests that ought to be something I ought to be looking at in determining preemption.

PJC Your Honor, we therefore pray that you reverse the District Court in whole or in part and grant us discovery, the ten appellants and the 1,300 other former players who are signed up for the punitive class have a right to know who did this to them. Thank you very much.

Court Thank you. The cases argued will stand submitted.

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NATIONAL FOOTBALL LEAGUE

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

RICHARD DENT, et al.,

Plaintiffs,

v.

NATIONAL FOOTBALL LEAGUE,

Defendant.

Case No.: 3:14-CV-02324-WHA

DEFENDANT NATIONAL FOOTBALL LEAGUE'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS THIRD AMENDED COMPLAINT

Date: **March 21, 2019**
Time: **8:00 a.m.**
Courtroom: **12 (19th Floor)**
Judge: **Honorable William Alsup**

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PRELIMINARY STATEMENT

To avoid preemption, Plaintiffs represented to the Ninth Circuit they could prove their negligence claim in a straightforward way that did not require interpretation of a Collective Bargaining Agreement ("CBA"). All a court would need to do to find the NFL negligent, Plaintiffs wrote, is "contrast the conduct at issue with the corresponding statutes to determine whether in fact the NFL violated the foregoing statutory regimes." (Appellants' Opening Brief ("App. Br.") 19.) Accepting that argument, the Court of Appeals remanded with clear instructions about what Plaintiffs had to do and—as important—what they could *not* do on remand: Plaintiffs must show "that the relevant statutes apply to the NFL, the NFL violated those statutes, and the alleged violations caused the players' injuries." *Dent v. Nat'l Football League*, 902 F.3d 1109, 1121 (9th Cir. 2018). The Ninth Circuit was also clear that Plaintiffs should not "conflate the NFL and the teams," and should limit remand proceedings "to claims arising from the conduct of the NFL and NFL personnel—not the conduct of individual teams' employees." *Id.*

Plaintiffs have not delivered. After filing four separate iterations of their complaint, having access to significant amounts of discovery from the *Evans* litigation, and arguing these issues before the Ninth Circuit and in response to three dispositive motions, Plaintiffs *still* have not articulated a coherent, let alone adequate, theory of liability. In their Opposition ("Opp'n."), Plaintiffs no longer argue that the statutes even *apply* to the NFL—let alone that the NFL violated them. Gone is the assertion that the NFL ever directly distributed (or handled, or administered, or even possessed) any medications; instead, Plaintiffs' latest assertion is that the NFL merely "involved itself" in such matters. And the only allegations Plaintiffs muster regarding the NFL's affirmative conduct are a handful of examples in which the NFL supported the Clubs' *compliance* with the drug laws. After years of litigation in which Plaintiffs have accused the NFL of purported statutory violations, the Opposition's silence about those statutes is telling.

Instead, Plaintiffs have changed tack. They now argue that the NFL's "fundamental" act of negligence was fostering a "Return to Play Business Plan" that involved overprescribing medications, while failing to prevent "Club doctors and trainers" from "violat[ing] drug laws and regulations regarding controlled substances." (Opp'n. 2.) But that is the same theory that this

Court held preempted in 2014 and that Plaintiffs subsequently disclaimed on appeal. After successfully persuading the Ninth Circuit that this was *not* their theory, Plaintiffs should not be permitted to bait-and-switch their way into a different negligence claim on remand.

Because Plaintiffs failed to state a claim upon which relief can be granted, and because their claims are time-barred, the Court should dismiss their complaint with prejudice.

ARGUMENT

I. PLAINTIFFS HAVE NOT ADEQUATELY PLED A CLAIM FOR NEGLIGENCE

A. The NFL Accurately Characterized Plaintiffs' Complaint and the Ninth Circuit's Opinion

The NFL's Motion to Dismiss ("Motion" or "Mot.") demonstrated that Plaintiffs failed to plead facts showing (1) that the NFL "distributed" medications; (2) that the Controlled Substances Act ("CSA"), Food, Drug, and Cosmetic Act ("FDCA"), or state statutes on which Plaintiffs rely apply to the NFL; or (3) that the NFL breached any statutory obligation. Rather than take those arguments head-on, however, Plaintiffs argue that "the fundamental factual underpinning of their claim" is not *actually* the NFL's violation of those statutes, but rather that "Club doctors and trainers would not have violated" those statutes (Opp'n. 2) absent an NFL-driven "Return to Play Business Plan" ("Business Plan"). The NFL's *true* breach of duty, they argue, was its "failure to act" in the face of those violations: "NFL personnel knew that the drug program it voluntarily created to monitor the handling and distribution of controlled substances was failing and yet the NFL took no action." (Opp'n. 13 ("Failure to act is the very definition of a breach of a duty.").)

That theory is the same one that this Court found preempted—and that Plaintiffs later disclaimed on appeal in order to obtain reversal. In 2014, this Court characterized Plaintiffs' theory as a failure to act: "[T]he clubs violated the federal statutes (allegedly) and the league was negligent (allegedly) in failing to detect and right it." (Dkt. No. 106 at 18.) On appeal, however, Plaintiffs attacked that characterization as "reversible error"—a "fundamental misperception" and "misunderstanding of the complaint [that] infected every aspect of [this Court's] analysis and eventual conclusion." (App. Br. 8, 14.) Instead, the "primary duty at issue" in this case, they argued, "was that the NFL must abide by federal and state law." (Appellants' Reply ("App. Rep.") 5.) Plaintiffs emphasized that their "claims do not require the court to weigh whether the NFL's

actions were reasonable—what is 'reasonable' is required by the statute." (App. Br. 31.) Rather, a court need simply "contrast the NFL's actions with its statutory obligations to determine whether it violated its duty." (App. Rep. 2; *see also* App. Br. 25 (similar).)

The Ninth Circuit took Plaintiffs at their word, reversing this Court's preemption holding in specific reliance on Plaintiffs' allegations of statutory violations by the NFL: "[H]ere, a court would have no need to consult the CBAs to resolve the plaintiffs' negligence claim" because "[i]nstead, it would compare the NFL's conduct with the requirements of state and federal laws governing the distribution of prescription drugs." *Dent*, 902 F.3d at 1120. Yet on remand, Plaintiffs have not even tried to explain how the statutes might apply to the NFL or which provisions the NFL allegedly violated. (*See* Mot. 8-10.)

Plaintiffs' only explanation for this shift is that they were not required to plead the elements of negligence *per se*. (*See* Opp'n. 11-12 ("As an initial matter, Plaintiffs pled . . . negligence only . . . [and] need not plead negligence *per se* elements").) But that misses the point entirely. Having repeatedly and explicitly tying the success of their claims to the NFL's failure to follow the law—and having obtained reversal on that basis—Plaintiffs cannot now claim that, all along, they merely pled those statutory violations simply to preserve their "ability to simplify the proof they must present relating to certain elements of their negligence claim." (Opp'n. 14-15.)[1]

Plaintiffs are now mischaracterizing their own complaint in a fruitless attempt to save it. Their assertion that they pleaded a "straight" negligence claim is belied by a simple review of the negligence count itself. Nearly every paragraph of that count asserts (in vague and boilerplate terms) the NFL's supposed "violation" of the CSA, the FDCA, or state law. (*See, e.g.*, TAC ¶ 299; *id.* ¶ 300; *id.* ¶ 310.) In fact, most of the count—including the entirety of its first six paragraphs—

[1] Of course, if Plaintiffs were *not* relying on negligence *per se*, their claim should still be dismissed because they have no plausible allegations in support of their assertion that the NFL breached any other standard of care. *See Hutchins v. Nationstar Mortg. LLC*, No. 16-CV-07067-PJH, 2017 WL 4224720, at *15 (N.D. Cal. Sept. 22, 2017) (dismissing negligence claim because plaintiff's complaint did not allege any facts demonstrating, among other things, breach since the "allegations discernable from the [complaint] at most relate[d] to purported statutory . . . violations that [had become] moot," rather than specific facts evidencing the breach of a duty).

is simply cut-and-pasted from the claim labeled "negligence per se" from their last complaint. (*Compare* TAC ¶¶ 299-310, *with* SAC ¶¶ 371-380.)

Nor can Plaintiffs salvage their complaint by attempting to blur the line between the NFL and the Clubs. Plaintiffs now argue, for the first time, that a supposedly "complicated" NFL-Club relationship cannot be clarified "without discovery." (*See* Opp'n. 4-6.) That transparent attempt to muddy the waters is misconceived. It is inconsistent with the Ninth Circuit's clear admonition to not "conflate the NFL and the teams," and to limit remand proceedings "to claims arising from the conduct of the NFL and NFL personnel—not the conduct of individual teams' employees." *Dent*, 902 F.3d at 1121. And it fails on its own terms: The TAC begins by stating "[t]he allegations herein are supported by hundreds, if not thousands, of documents that have been produced, and by testimony provided from" various NFL and Club witnesses. (TAC ¶ 1.) More discovery will not help Plaintiffs with a "puzzle" (Opp'n. 4) that is already solved.

B. Plaintiffs Failed to Establish That the NFL Owes a Duty to Plaintiffs

Contrary to their assertions, Plaintiffs must plead sufficient facts to establish that the NFL owes them a duty of care. "[T]he existence of a legal duty in a given factual situation is a question of law for the courts to determine." *Jackson v. AEG Live, LLC*, 233 Cal. App. 4th 1156, 1173 (2015). Simply "alleg[ing]" such a duty is insufficient to survive a motion to dismiss. (Opp'n. 8); *see, e.g.*, *Sun v. Wells Fargo Bank, Nat'l Ass'n*, No. 14-CV-00063-WHA, 2014 WL 2142525, at *1 (N.D. Cal. May 22, 2014) (Alsup, J.).

Although Plaintiffs suggest that the Ninth Circuit already "recognized" (Opp'n. 1) that the NFL owes them a duty, they eventually concede (as they must) that the NFL owes a duty *only* if one "assum[es]" that "the NFL engaged in the handling, distribution and administration of Medications." (Opp'n. 8); *see Dent*, 902 F.3d at 1119 (NFL owes a duty of care only "to the extent the NFL is involved in the distribution of controlled substances"). Unable to meet that standard, Plaintiffs now assert that "they have identified" for the first time not one, but two *other* "common law duties owed by the NFL to Plaintiffs." (Opp'n. 12.) Each theory fails.

1. Plaintiffs Have Not Plausibly Alleged That the NFL Distributed or Administered Any Medications

The Ninth Circuit was specific and direct: To proceed on a "negligence claim . . . will require the players to establish that the relevant statutes apply to the NFL, [and] the NFL violated those statutes…." *Dent*, 902 F.3d at 1121. Moreover, Plaintiffs could only establish these elements based on the "conduct of the NFL and NFL personnel—not the conduct of individual teams' employees." *Id.*

As shown in the NFL's Motion, Plaintiffs fail to plausibly allege that the NFL owes a duty under the Ninth Circuit's clear test because they cannot allege that any NFL employee, as opposed to Club doctors and trainers, ever "distributed," "administered," or "handled" any medications. (Mot. 6-8.)[2] Plaintiffs respond, not by pointing to any such allegations, but rather by insisting that they need not allege "that the NFL or its personnel physically handed Plaintiffs the Medications." (Opp'n. 6.)

The Ninth Circuit's opinion, however, says otherwise: "[A]s we read the complaint, the plaintiffs are not merely alleging that the NFL failed to prevent medication abuse by the teams, but that the NFL *itself* illegally distributed controlled substances, and therefore its actions directly injured players." *Dent*, 902 F.3d at 1118.

This is not mere semantics. It *matters* whether the NFL or someone else actually distributed the medications; the answer to that question determines who is subject to the CSA and other laws that Plaintiffs cite—as Plaintiffs themselves acknowledged on appeal. (*See* App. Rep. 17-18 ("Determining whether the NFL could be liable under federal and state drug laws likely turns on whether it, *inter alia*, distributed Medications in a manner that makes it subject to those statutes.").) For example, the CSA prohibits the "manufacture, distribut[ion], or dispens[ing]" of controlled substances. 21 U.S.C. § 841(a). And for purposes of the statute, "distribution" and "administration" have defined meanings. "The term 'administer' refers to the direct application of a controlled substance to the body of a patient or research subject by" the practitioner or his patient.

[2] For all their statements about "NFL doctors and trainers," Plaintiffs still have not identified the name of a single "NFL doctor" or "NFL trainer" who allegedly prescribed medicine unlawfully.

21 U.S.C. § 802(2). "The term 'distribute' means to deliver (other than by administering or dispensing) a controlled substance or a listed chemical." *Id.* § 802(11). Thus, to be subject to the CSA, an individual or entity must, at a minimum, possess the medications that are to be distributed or administered.[3] Plaintiffs' theory of liability therefore falls apart because the NFL itself is not alleged to have "distributed" or "administered" medications and is therefore not subject to the laws in question. (*See* Mot. 8-10.)

The only specific allegations Plaintiffs can muster about NFL conduct relate to the ways that *Clubs* distributed medications to their patients. "[R]equir[ing] reports from teams on the volume of drugs they were distributing to their players" (Opp'n. 3), attempting to "mandate that every Club use drug tracking software" (*id.* at 4), "approv[ing] Club financial arrangements with doctors and medical groups" (*id.* at 3), and "sponsor[ing] League-wide studies on the effects of certain Medications" (*id.* at 4), for example, do not constitute "distribution" or "administration" of medications within the CSA's definition of these terms. *See* 21 U.S.C. §§ 802(2), (11). And even crediting those allegations, they are a far cry from what Plaintiffs promised the Ninth Circuit—i.e., "that the NFL violated the Drug Control Act, Food and Drug Act, and corresponding state statutes with regard to the manner in which it (*not the Clubs*) obtained and administered Medications." (App. Br. 19 (emphasis added).)

Having retreated from their claims that it was the NFL that had obtained and administered medications, Plaintiffs seek shelter in the Ninth Circuit's reference to whether the NFL had "any role" in distributing or administering the medications. *Dent*, 902 F.3d at 1121. That does not cure the TAC's deficiencies because, regardless of whether "there may have been others involved," Plaintiffs still must show that "the NFL *directly participated* in the handling, distribution and administration of the medications." (Opp'n. 2 (emphasis added)); *see, e.g.*, 21 C.F.R. § 1301.11(a) (2018). Absent a plausible allegation that the NFL itself "manufacture[d], distribute[d], or

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[3] Although plaintiffs refer to the "handling" of controlled substances (*see* Opp. at 2-3, 8, 14), the CSA does not actually use the term in its list of prohibited acts. *See* 21 U.S.C. § 841(a)(1). However, to the extent that "handling" is relevant, it presupposes that the NFL must have actually possessed the medications at some point as well.

dispense[d]" controlled substances in violation of the statute, it owed no duty as a matter of law.[4]

2. Plaintiffs Cannot Establish That the NFL Voluntarily Assumed a Duty

Implicitly acknowledging the absence of any allegation that the NFL had *itself* distributed any medications in violation of the law, Plaintiffs argue that the NFL voluntarily assumed a duty to ensure that the Clubs did not do so. (Opp'n. 9; *see* TAC ¶ 305.) This too is inconsistent with Plaintiffs' position before the Ninth Circuit. After the NFL argued that any claim that the NFL "voluntarily assume[d]" a duty to the players would be preempted under Supreme Court precedent (Appellee Br. 26), Plaintiffs rejected that characterization of their theory:

> By reframing the claims in this manner, the NFL seeks to implicate common law duties and rights that some courts have deemed preempted. But the primary duty at issue . . . was that the NFL must abide by federal and state law regulating, inter alia, the dispensation of Medications.

(App. Rep. 5.) The Ninth Circuit expressly permitted Plaintiffs to proceed on the basis of that statutory duty to obey the law—not because the NFL assumed a duty. *See Dent*, 902 F.3d at 1121.

In any event, Plaintiffs have not pled facts sufficient to support their "assumed duty" theory. "The duty of a 'good Samaritan' is limited." *Baker v. City of Los Angeles*, 188 Cal. App. 3d 902, 907 (1986). *First*, a defendant must have "specifically" undertaken to perform the task that he is charged with having performed negligently. *Artiglio v. Corning*, 18 Cal. 4th 604, 614 (1998). *Second*, a defendant's undertaking will support the finding of a duty to another only if (a) the defendant's action "increases the risk of harm to another person, or (b) the other person reasonably relies upon the volunteer's undertaking and suffers injury as a result." *Jackson*, 233 Cal. App. 4th at 1175 (citation omitted). In general, the negligent undertaking doctrine is "not favored in the law." *Rotolo v. San Jose Sports & Entm't, LLC*, 151 Cal. App. 4th 307, 336 (2007).

Plaintiffs have not alleged facts that, if proved, would establish: (1) the tasks that the NFL has "specifically" undertaken regarding Plaintiffs' medical care; (2) the duty that arose from the NFL's specific undertakings; (3) how the NFL performed those tasks negligently; (4) how the

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[4] Plaintiffs make no effort to explain how the "NFL and NFL personnel—not … individual team[] employees," engaged in conduct that violated the FDCA or state pharmacy laws. *Dent*, 902 F.3d at 1121; (Mot. at 9-10); *see also, e.g.,* 21 U.S.C. § 331 (the FDCA's prohibition of misbranding or adulterating covered medications or their manufacture, introduction, or delivery).

NFL's actions increased the risk of harm to Plaintiffs; or (5) how any Plaintiff reasonably and detrimentally relied upon the NFL's undertaking of the those undefined tasks.[5] In fact, Plaintiffs contend the opposite, insisting that the NFL failed to undertake *any* aid or services, *i.e.*, that "the League *did nothing*" to protect the players. (TAC ¶ 214 (emphasis added); *see* Opp'n. 13 ("[T]he NFL took no action."); TAC ¶¶ 213-229); *see also Doe v. U.S. Youth Soccer Ass'n*, 8 Cal. App. 5th 1118, 1128-29 (2017) (general rule is that there is "no duty to act to protect others from the conduct of third parties") (citation omitted). As this Court has explained, "no decision in any state (including California) has ever held that a professional sports league owed such a duty to intervene and stop mistreatment by the league's independent clubs." (Dkt. No. 106 at 6.)[6] Plaintiffs offer no basis in their Complaint for imposing one here.

3. Plaintiffs Cannot Establish a Duty Based on a Special Relationship

In their Opposition, Plaintiffs also for the first time allege that the NFL owes a duty based on a "special relationship" with the players. Because that argument does not appear in the TAC (or either of their other lengthy complaints), it may be rejected for that reason alone. *See, e.g.*, *Frenken v. Hunter*, No. 17-CV-02667-HSG, 2018 WL 1964893, at *3 (N.D. Cal. Apr. 26, 2018).

In any event, this theory, which applies only in rare circumstances, could not apply here. As Plaintiffs' own authority recognizes, the theory applies to particularly "vulnerable" populations, such as students in the "collegiate environment," which "is unlike any other" in that students "are dependent on their college communities to provide structure, guidance, and a safe learning

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[5] Plaintiffs' Opposition does not dispute that by citing to various studies, publications, task forces, and recommended "best practices" regarding the dispensing of medications to players, Plaintiffs cannot establish that the NFL "voluntarily" assumed a duty to comply with federal and state law regarding the distribution, handling, and administration of medications. (Mot. 7-8.) And as the NFL's Motion demonstrated, none of Plaintiffs' remaining allegations purportedly triggering an assumed duty involved individuals employed by the NFL. (*Id.*) Plaintiffs also fail to plausibly allege that they detrimentally relied on any action taken by the NFL.

[6] *Mayall ex rel. H.C. v. USA Water Polo, Inc.*, 909 F.3d 1055 (9th Cir. 2018) is inapposite, as it does not involve a professional sports league or its relationship to independent clubs. Instead, *Mayall* allowed a negligence claim to proceed based on an allegation that the organization "undertook a specific responsibility to establish and enforce rules to ensure the safety of athletes in its youth water polo league." *Id.* at 1067. Given the comprehensive CBA governing the Clubs and players regarding player safety and medical care, any similar claim in this case would be preempted under Section 301 of the Labor Management Relations Act.

environment." *Regents of the Univ. of Cal. v. Superior Court*, 4 Cal. 5th 607, 624-25, 668 (2018).[7] When it comes to medical care, NFL players cannot be considered specially "vulnerable" or reliant on the NFL "for protection," considering that they enjoy a bevy of collectively bargained rights over their medical care—including the guaranteed right to seek a second medical opinion.[8] Plaintiffs offer no authority indicating that the NFL—or any professional sports league—should be deemed to have such a "special relationship" with the professional athletes employed by its teams.

C. Plaintiffs Failed to Plausibly Allege Breach of Any Duty

Plaintiffs also were required to adequately plead breach. Here, the Ninth Circuit found that breach would turn on whether "the NFL violated [the relevant] statutes." *Dent*, 902 F.3d at 1121 ("a court would have no need to consult the CBAs to resolve the plaintiffs' negligence claim" because instead it could "compare the NFL's conduct with the requirements of state and federal laws"); (*see also* App. Rep. 2 (arguing on appeal that the court would need only to "contrast the NFL's actions with its statutory obligations to determine whether it violated its duty"). But, as discussed above, Plaintiffs' Opposition fails to allege how the NFL allegedly violated any of the statutory obligations cited in the TAC. Indeed, their Opposition barely mentions the statutes. After having argued that "if the NFL thinks that it is beyond the purview of these statutes, it should make that argument in a motion to dismiss for failure to state a claim" (Appellants' Reply ("App. Rep.") 17), Plaintiffs' inability to respond once confronted with that argument speaks volumes.

Plaintiffs instead now rest their theory of breach on the allegation that "NFL personnel knew" that the "drug program" was failing "and yet the NFL took no action." (Opp'n. 13; *see id.* ("Failure to act is the very definition of a breach of a duty.").) But once again, that was the theory that this Court found preempted, and that the Ninth Circuit was persuaded to reject:

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[7] *See Martine v. Heavenly Valley Ltd. P'ship*, 27 Cal. App. 5th 715, 726 (2018) (finding that the case upon which Plaintiffs principally rely (*Regents of Univ. of Cal.*)"c[ould] not be read to create a special relationship imposing an affirmative duty to warn and protect others of inherent dangers where the plaintiff assumes a risk of injury by intentionally engaging in dangerous activity").

[8] *See, e.g.*, Declaration of Dennis L. Curran (Dkt. No. 73), Ex. 11 (2011 CBA) Art. 39 § 4 (ability to seek second opinion); Art. 39 § 5 (ability to have medical care provided at team's expense by a surgeon of player's choice); Art. 40 (ability to inspect medical records); Art. 39 §§ 1-2 (right to board-certified doctors and certified trainers, and guarantee that Club physicians will make decisions in best interest of player).

> The district court believed that the "essence" of the plaintiffs' negligence claim "is that the individual clubs mistreated their players and the league was negligent in failing to intervene and stop their alleged mistreatment." However, as we read the complaint, the plaintiffs are not merely alleging that the NFL failed to prevent medication abuse by the teams, but that the NFL *itself* illegally distributed controlled substances, and therefore its actions directly injured players.

Dent, 902 F.3d at 1118; *compare* Dkt. No. 106 at 12 (holding negligence claim preempted because "determining the extent to which the NFL was negligent in failing to curb medication abuse by the clubs" would require analysis of CBA). As Plaintiffs' discussion of their various theories of duty make clear, they are now telling this Court that it was right the first time—that it was not really the NFL's statutory violations, but instead its "failure to act" in the face of violations by the Clubs, that constituted a breach. That theory is squarely at odds with both the Ninth Circuit's decision and well-established principles of preemption, and must be rejected.

D. Plaintiffs Failed to Plausibly Allege Proximate Causation

The NFL's Motion to Dismiss explained that the alleged link between the NFL's actions and Plaintiffs' injuries is entirely conclusory and insufficient to state a claim for negligence or negligence *per se*. (Mot. 12.) Neither of Plaintiffs' responses suggests otherwise.

First, Plaintiffs argue that causation is a jury question. But "where the facts are such that the only reasonable conclusion is an absence of causation, the question is one of law, not of fact." *State Dep't of State Hosps. v. Superior Court*, 61 Cal. 4th 339, 353 (2015) (citation omitted). And either way, a plaintiff must still plausibly allege proximate cause, by asserting "factual content that allows the court to draw the reasonable inference" that there is "a direct relationship between the injury asserted and the injurious conduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Hill v. Opus Corp.*, 841 F. Supp. 2d 1070, 1096 (C.D. Cal. 2011).

Second, Plaintiffs offer the *ipse dixit* assertion that they "have adequately alleged that the NFL, through the maintenance of its Business Plan and its failings associated with the handling, distribution and administration of Medications, caused the injuries at issue." (Opp'n. 13-14.) The portions of the TAC Plaintiffs cite, however, are just recitations of the injuries that the players suffered at the hands of "team doctors and trainers." (*E.g.*, TAC ¶ 273.) In fact, the TAC makes clear that, whatever the NFL's alleged failings, it was the *prescribing doctors'* failures to warn

them that allegedly caused their injury. For example, Dent explains that because he "trusted and relied on the NFL's doctors and trainers," he "would not have taken the Medications in the manner and amount in which [they] did had the Defendant provided him with the information it was legally obligated to provide as discussed herein." (TAC ¶ 27.[9]) Plaintiffs' conclusory reference to these prescribing personnel as the "NFL's" doctors and trainers does not change the fact that, by Plaintiffs' own account, they *would not have been injured* had they simply received better warnings from the *Clubs*. (*See, e.g.,* TAC ¶¶ 19-25 (alleging injuries were "caused" by "the wrongful administration of Medications" he allegedly received "from" the Chicago Bears, San Francisco 49ers, Indianapolis Colts, and Philadelphia Eagles).[10]

As in *Evans*, nothing in the TAC draws any connection, let alone a causal link, between Plaintiffs' injuries and the NFL's alleged actions or omissions. *See Evans v. Arizona Cardinals Football Club, LLC*, 252 F. Supp. 3d 855, 862-63 (N.D. Cal. 2017) (faulting Plaintiffs for failing to offer a "plausible nexus . . . between their alleged damages and the clubs' alleged misconduct"). To the contrary, the few allegations specifically about the NFL all assert that the NFL tried to *encourage* compliance with the law. (*See, e.g.*, Opp'n. 3-4 (noting, as examples of the NFL's ostensible negligence, that the NFL "mandated that Clubs have locked drug storage areas," "mandated that Clubs and their doctors register their stadiums and practice facilities," established safety committees, *etc.*).) Plaintiffs' conclusory allegations are insufficient to allege causation.[11]

Plaintiffs also have no answer to the argument that the actions allegedly taken by the NFL have nothing to do with their injuries *because those actions occurred decades after most of*

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[9] Each Plaintiff makes this identical allegation. (*See* TAC ¶ 36 (Newberry); ¶ 45 (Green); ¶ 55 (Hill); ¶ 64 (Van Horne); ¶ 74 (Stone); ¶ 84 (Pritchard); ¶ 94 (McMahon); ¶ 105 (Wiley).)

[10] Plaintiffs do not bother to respond to the NFL's argument that their causation pleading has the same etiology defects as in *Evans*. (Mot. 12 n.7)

[11] To avoid the defects in their causation allegations, Plaintiffs argue only that the Ninth Circuit recognized that it was "foreseeable that the NFL's conduct . . . proximately caused the injuries complained-of here." (Opp'n. 13.) But that portion of the court's opinion is inapposite. The Ninth Circuit observed that addictions and long-term health problems "can be established with certainty, and they are closely connected to the misuse of controlled substances," *Dent*, 902 F.3d at 1119, in finding that a party would owe a *duty of care* to the extent that it distributed or administered controlled substances; it had nothing to do with the issue of causation. *Id.*

Plaintiffs' injuries occurred. For example, Plaintiffs allege that the NFL acted improperly by allowing Club doctors to undertake studies (TAC ¶ 164), attending meetings where Club doctors and trainers were present (TAC ¶ 183), informing Clubs of medication tracking software (TAC ¶ 178), meeting with the DEA (TAC ¶¶ 214-15), and setting up a visiting Club liaison program (TAC ¶ 182). Yet the TAC admits that all of these events occurred in the 2010s or late 2000s, at least ten years *after* lead plaintiff Dent retired. (TAC ¶¶ 18, 183-212.) And it is axiomatic that a plaintiff cannot show that an injury was caused by an act that followed it.

II. THE TAC REVEALS THAT PLAINTIFFS' ACTION IS TIME BARRED

A. Plaintiffs' Claims Accrued Before May 20, 2012

Plaintiffs' Opposition admits that, under California's "discovery rule," the limitations period begins to run on a claim when "the plaintiffs have reason to at least suspect that *a type of wrongdoing* has injured them." (Mot. 15 (citation omitted); *see* Opp'n. 16:15-16.) Plaintiffs' reasonable suspicion need only be about "the 'generic' elements of wrongdoing, causation, and harm." (Mot. 15 (citation omitted).) A plaintiff "need not be aware of the specific 'facts' necessary to establish the claim" (*id.* (citation omitted)), nor must he know its specific legal theory. (*See id.*); *see also Norgart v. Upjohn Co.*, 21 Cal. 4th 383, 399 (1999).

As an initial matter, the TAC demonstrates that Plaintiffs had actual notice of the *specific type* of wrongdoing that they now allege: that "the Business Plan coerced [them] to return to play far sooner than [they] should have." (Opp'n. 18; *see id.* at 2; TAC ¶¶ 17, 19; Mot. 16-17.) Plaintiffs themselves admit that the fundamental elements of this "plan" were publicly known for decades (*see, e.g.,* TAC ¶¶ 1-7), and that they themselves were aware of the manner in which it was implemented—because they knew "that, from at least 1969 through 2008 when they played in the League, controlled substances and medications requiring prescriptions were illegally provided to them and thousands of other players in quantities and at frequencies that shock the conscience" so they would "play through injuries." (TAC ¶¶ 6-7, 13.)

Plaintiffs' Opposition also fails to dispute the significance of their admission in the TAC that the "doctors they saw after their careers concluded did tell them that *some of their ailments might be the result of the amount of Medications they took during their NFL careers*." (TAC ¶ 108

(emphasis added); Mot. 16.) Although Plaintiffs assert that they lacked knowledge that the NFL "was involved in the handling, distribution, and administration of those Medications in a way that breached a duty" (Opp'n. 18), that is not relevant under California law. (*See* Mot. 15.) It is well-settled that a "plaintiff discovers the cause of action when he at least suspects a factual basis, *as opposed to a legal theory*, for its elements. . . ." *Norgart*, 21 Cal. 4th at 397 (emphasis added). Plaintiffs' alleged ignorance of the *NFL's* purported involvement is irrelevant. (*See* Mot. 15.)[12]

Plaintiffs cannot avoid the limitations period by alleging that they seek to recover for "exacerbated muscular-skeletal injuries." (Opp'n. 15.) Under California law:

> where an injury, although slight, is sustained in consequence of the wrongful act of another . . . the statute of limitations attaches at once. It is not material that all the damages resulting from the act shall have been sustained at that time, and the running of the statute is not postponed by the fact that the actual or substantial damages do not occur until a later date.

Nodine v. Shiley Inc., 240 F. 3d 1149, 1153 (9th Cir. 2001) (citation omitted).

And Plaintiffs cannot cure their time-barred claims by focusing on a single allegation that one plaintiff (Wiley) was "hospitalized and diagnosed with partial renal failure" in "April 2014," (Opp'n. 15). Moreover, their argument that the injury "did not manifest" until 2014 is unsupported by any allegation of the TAC.[13] Wiley's alleged hospitalization for kidney failure simply reflects a later manifestation of injuries that he had previously sustained allegedly due to the same, allegedly wrongful act—that "the Business Plan coerced [Plaintiffs] to return to play far sooner than he should have . . . ." (Opp'n. 18.) As Wiley alleges, he played through injury because, at the time, he "thought his injury was one the NFL would expect him to play through," received injections

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[12] Plaintiffs' cited case law is readily distinguishable. *See Ward v. Westinghouse Can., Inc.*, 32 F.3d 1405, 1408 (9th Cir. 1994) (genuine issue of fact regarding when the plaintiff should have "suspected that a third party's *wrongdoing* caused his pain and injury"); *Gryczman v. 4550 Pico Partners, Ltd.*, 107 Cal. App. 4th 1, 6 (2003) (plaintiff could not have discovered its cause of action because "the failure to give plaintiff notice of the happening of a certain event is both the act causing the injury and the act that cause plaintiff not to discover the injury," where defendant conveyed real property without notice to the plaintiff, who learned of the wrongful conveyance years later by driving past the property); *April Enters., Inc. v. KTTV*, 147 Cal. App. 3d 805, 827 (1983) (Parties were "joint venturers, each occupying a fiduciary relation to the other.").

[13] Indeed, Wiley does not allege that he lacked actual notice of, or could not have discovered, harm to his kidney before May 20, 2012.

"[t]o do so," and remained "in pain" after the season. (TAC ¶¶ 100-101; Mot. 17.)[14]

Plaintiffs have not alleged that Wiley's later-manifested ailment is a "qualitatively different" injury, lacking biological or pathological links to those sustained during his playing days. As such, Wiley's later-manifested injury does not give rise to a separate cause of action that accrued later in time. *Cf. Pooshs v. Philip Morris USA, Inc.*, 51 Cal. 4th 788, 796, 802 (2011) (parties agreed that "COPD is a separate illness, which does not pre-dispose or lead to lung cancer and that it has nothing medically, biologically, or pathologically to do with lung cancer.").

Throughout their Opposition and TAC, Plaintiffs assert facts establishing that their initial suspicions of wrongdoing—and their knowledge of a supposed relationship between their injuries and the medications they allege the NFL provided to them—occurred before May 20, 2012. The limitations period therefore expired prior to the filing of this lawsuit.

B. Plaintiffs Have Not Adequately Alleged They Could Not Have Reasonably Discovered Facts Supporting the Cause of Action Until After May 20, 2012

Because Plaintiffs allege that they had a suspicion of *some* purported wrongdoing before May 20, 2012, they were obligated to plead facts alleging that once they suspected *some* wrongdoing, they "conduct[ed] a reasonable investigation of all potential causes of that injury." (Mot. 15 (alteration in original) (citation omitted).) Neither Plaintiffs' Opposition nor the TAC identify any such facts.

Plaintiffs argue that their lack of diligence was excused because they "trusted" their doctors and "were allowed to relax their guard." (Opp'n. 21-22.) This theory lacks support in California law or the TAC. The cases Plaintiffs cite involve situations where the plaintiffs had a special relationship of trust with a third party that made an *affirmative* misrepresentation, which tolled the

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[14] Though Plaintiffs' Opposition relies only on the allegations about Wiley's diagnosis of partial renal failure in 2014, other Plaintiffs allege that they continued to experience effects of their injuries after retirement. *See, e.g.*, TAC ¶ 286 (alleging that Newberry learned of "decreasing kidney function . . . *one night after retiring*" (emphasis added)); ¶ 278 ("*After leaving the NFL*," Hill took Prednisone and thereafter "developed an abscess in his lung;" Hill experiences "atrial fibrillation," "blood clots," and "suffers regularly from muscular-skeletal pain" (emphasis added)); ¶ 279 (alleging that "*since retiring*, Keith Van Horne has had two cardiac ablations" (emphasis added)). These allegations are similarly immaterial to the statute of limitations analysis in light of Plaintiffs' allegations of earlier notice of injury and wrongdoing.

statute of limitations.[15] The TAC neither adequately alleges a special relationship between the NFL and Plaintiffs (nor could it (*see supra* Section I.B.3.)); nor that the NFL made affirmative representations that Plaintiffs relied upon in delaying their lawsuit.

Plaintiffs also argue that they *did* inquire into the causes of their injuries and were told that "Medications" were *not* the cause. (*See* Opp'n. 20 ("[T]he trusted doctors and trainers from whom they sought such knowledge told them nothing was wrong."); *id.* at 22 ("Plaintiffs asked their NFL doctors and trainers whether there were any issues with the Medications and were told 'no.'").) But these assertions are not supported by allegations in the TAC.[16]

Ultimately, Plaintiffs rest their entire theory of diligence on a single, bare allegation that they "exercised reasonable diligence to try to discover the facts at issue," but "no doctor or trainer" ever told them "about the side effects of the Medications they were being given, the dangers of 'cocktailing'" or "'of the League's involvement in the recordkeeping, handling, and distribution of the Medications.'" (Mot. 18 (citing TAC ¶ 108).) But Plaintiffs never allege they asked *their* doctors about the potential dangers of the medications. (*Id.*) Their attempt to shift the burden of their duty to investigate to third parties fails as a matter of law. *See Fox v. Ethicon Endo-Surgery, Inc.*, 35 Cal. 4th 797, 809 (2005).

CONCLUSION

For the reasons discussed above and in the NFL's Motion, the TAC—which was supposed to be Plaintiffs' "best and final" pleading (Dkt. No. 117 at 2)—should be dismissed with prejudice.

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[15] *See Gutierrez v. Mofid*, 39 Cal. 3d 892, 899 (1985) (where "harm caused by medical malpractice is not immediately apparent" and the patient "may not suspect he has been wronged . . . he may *reasonably rely* upon his negligent physician's *soothing disclaimers*." (emphasis added)); *Sanchez v. S. Hoover Hosp.*, 18 Cal. 3d 93, 101-02 (1976) (applying "'inquiry' rule" to medical malpractice claim and noting that "the patient is fully *entitled to rely* upon the physician's *professional skill and judgment* while under his care" (emphasis added)); *Knapp v. Knapp*, 15 Cal. 2d 237, 242 (1940) (where respondents were trustees for benefit of appellant, "appellant was *entitled to rely upon their report* to him without making any independent investigation" (emphasis added)).

[16] Plaintiffs' reliance on an unpublished California case, *Sosunova v. Regents of Univ. of Cal.*, 11 Cal. Rptr. 2d 130 (1992) (Opp'n. 20), is therefore misplaced. *See Sosunova,* 11 Cal. Rptr. 2d at 133 (where a plaintiff's doctor "assured her that her injury did not occur at the clinic . . . the effect of these statements [was] a question of fact upon which reasonable minds could differ").

Dated: February 14, 2019

SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP

By: */s/ Jack P. DiCanio*
Jack P. DiCanio

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NATIONAL FOOTBALL LEAGUE

CERTIFICATE OF SERVICE

I hereby certify that on February 14, 2019, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will send a notice of electronic filing to counsel of record for Plaintiffs and which constitutes service under Civil L.R. 5-1(h)(1).

Dated: February 14, 2019

/s/ Jack P. DiCanio
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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

RICHARD DENT, *et al.* Plaintiffs, v. NATIONAL FOOTBALL LEAGUE, a New York unincorporated association, Defendant.	) **CASE NO. 3:14-CV-02324 WHA**)) **PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION TO DISMISS THIRD AMENDED COMPLAINT**))) **Date:** **March 7, 2019**) **Time:** **8:00 a.m.**) **Courtroom:** **12, 19th Floor**) **Judge:** **Hon. William Alsup**	

[1] Mr. Byrne passed away unexpectedly on January 6, 2019.

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INTRODUCTION

At trial, both parties, of course, must present evidence on their claims and defenses and, in doing so, they do their best to craft a narrative to explain what all the evidence should be telling a fact finder. And, some day, that might occur in this case; if so, the NFL already has its narrative crafted and, if motions like the instant one are prologue, will be ever so ready to pounce on any failings by Plaintiffs to provide sufficient evidence.

But we are not at trial. Only one narrative matters at this stage – Plaintiff's narrative, and Plaintiffs are entitled to all reasonable inferences in their favor. Plaintiffs, not the NFL, are the authority on what their complaint says and they need not prove any of it at this stage of the proceedings.

All of that means something; namely, this is not the time to interject disbelief as to what evidence may be adduced or concern about cost to be spent if a plaintiff has plausibly pled its claims. And that the Plaintiffs have done – a single negligence count premised on the well-pled allegations that for decades, the NFL supplied controlled substances and prescription drugs to its players in amounts (*e.g.*, the number of injections) and a manner (*e.g.*, without a prescription or a failure to warn of effects) that violate federal and state laws. The NFL, as recognized by the Ninth Circuit, owed those players a duty, which they breached and which proximately caused the latent injuries complained-of in the Third Amended Complaint.

In 2013, Plaintiffs first made the connection between those injuries and the aforementioned illegal conduct. In May 2014, on behalf of all retired players, they filed a complaint to seek redress for the injuries that class has suffered, and continues to suffer, as a result thereof. Enough time has passed since then. Legal arguments about preemption, along with claims asserted by Plaintiffs, have fallen by the wayside. Now is the time to get this right.

ARGUMENT

I. DEFENDANT MISCHARACTERIZES THE ALLEGATIONS IN THE THIRD AMENDED COMPLAINT.

As it has done since the outset, the NFL conflates the applicable legal standards, arguing that Plaintiffs must "establish" certain elements, rather than plausibly plead them, and mischaracterizes Plaintiffs' factual allegations. A plain reading of Plaintiffs' Third Amended Class Action Complaint ("TAC") shows that, while there may have been others involved, the NFL directly participated in the handling, distribution and administration of the medications detailed therein (the "Medications") and that such actions proximately caused the complained-of injuries. The eighty-nine page and three-hundred and ten paragraph TAC provides more than enough factual allegations to plausibly plead negligence claims against the NFL.

A. The Return to Play Plan is the Basis for Plaintiffs' Negligence Claim.

The NFL completely ignores its role in the creation, implementation and maintenance of the Return to Play Business Plan ("Business Plan"). It addresses the same in a single footnote, claiming that the "baseless allegations" regarding the Business Plan "are irrelevant to the single claim in this lawsuit – that the NFL allegedly provided players with controlled substances in a manner that violated the law." ECF No. 121 at 4 n.2. The NFL's failure to grapple in any way with the fundamental factual underpinning of Plaintiffs' claim should doom its motion. But for the Business Plan, Club doctors and trainers would not have violated drug laws and regulations regarding controlled substances and prescription drugs and Plaintiffs would not have been injured. Put simply, it matters not who actually put a pill in a player's hand, but rather, how it came to be that, despite a comprehensive and thorough regulatory scheme designed to prevent the abuses at issue, those abuses nonetheless occurred. Like a drug

kingpin, the NFL may not itself be on the street dealing, but the dealing would not be occurring without its direction.

Plaintiffs have pled that they suffered muscular-skeletal injuries while playing and knew of the same when they occurred. Likewise, they have pled that, while playing, they received Medications from Club doctors and trainers, whom they trusted and believed were acting in their best interests. But the foregoing allegations, while a necessary part of the narrative, is separate and apart from the legal analysis to be applied at this stage of the proceedings to the simple and singularly-focused claims that Plaintiffs have pled. Rather, those claims are based on two sets of injuries: internal injuries that ***did not manifest*** until years after Plaintiffs finished their NFL careers, and pain and suffering caused solely by the exacerbation of their muscular-skeletal injuries because the NFL, through its Business Plan, mandated that they be denied the rest they needed and instead were provided Medications, indiscriminately and without compliance with federal and state laws, to return to play at the earliest possible juncture.

B. For Decades, the NFL Directly Administered, and Maintained the Business Plan, Which was Predicated on the Illegal Distribution of Medications.

The TAC is replete with allegations of the NFL's direct involvement, via the Business Plan and otherwise, in the handling, distribution and administration of the Medications. Specifically, the TAC alleges that the NFL: (1) compiled weekly injury reports and required reports from teams on the volume of drugs they were distributing to their players, *see e.g.*, ECF No. 119 at ¶¶163, 188–96, 206–12; (2) mandated that the Clubs have locked drug storage areas at their facilities, *id.* at ¶178; (3) mandated that Clubs and their doctors register their stadiums and practice facilities – *i.e.*, the places where they distributed controlled substances – with the DEA, *id.* at ¶178; (4) approved Club financial arrangements with doctors and medical groups,

id. at ¶179; (5) sought to mandate that every Club use drug tracking software from SportsPharm, *id.* at ¶178; (6) through its personnel, regularly attended meetings with Clubs and their doctors and trainers to specifically discuss, provide guidance regarding, and oversee distribution of, Medications, *id.* at ¶¶183, 204; (7) established committees to discuss and oversee the distribution of Medications, *id.* at ¶159; (8) had NFL security conduct on-site inspections of the Clubs' facilities to ostensibly determine compliance with the laws identified in the TAC, *id.* at ¶180; (9) sponsored League-wide studies on the effects of certain Medications, *id.* at ¶¶164–72; (10) interacted with the DEA regarding the manner in which certain Medications were distributed to NFL players, *id.* at ¶¶214–20; (11) publicly referred to Club doctors as ***OUR*** doctors, defended Club doctors from public criticism, and paid DEA fines on behalf of the Clubs, *id.* at ¶198; and (12) mandated that visiting Clubs use the local Clubs' doctors for the administration of Medications, *id.* at ¶221.

Further, while the NFL tries to draw a clear line between it and that of its Clubs, that relationship is complicated and, without discovery, it will not be entirely clear to anyone (perhaps not even the NFL) what exactly that relationship is, and concomitantly, what that may mean for this case. What we do know is that the structure of the NFL is defined by its Constitution and By-Laws.[2] Constitution and Bylaws of the National Football League (2006), static.nfl.com/static/content/public/static/html/careers/pdf/co_.pdf. And although the NFL and the clubs are independent legal entities, there is more to the puzzle.

To name but a few aspects of the complex relationship: the only members of the NFL are the Clubs, which meet annually and specially as determined by the Commissioner, *see e.g.*, Constitution and Bylaws of the National Football League, at 18, §§5.1, 5.0; the NFL Executive

[2] *See, e.g.*, *Lee v. City of L.A.*, 250 F.3d 668, 689 (9th Cir. 2001) (court may take judicial notice of matters of public record without converting a motion to dismiss into a motion for summary judgment).

Committee consists of one representative from each Club and votes on matters of significance, including the hiring and firing of the Commissioner and determining his compensation, *id.* at 23, §6.1; all Club employees, including coaches and players, agree to be bound by the NFL Constitution and By-Laws, *id.* at 11, §3.11(D); the Commissioner may establish committees, populated by NFL and Club employees, *id*. at 25, §6.7; and the Commissioner may discipline (including fines up to $ 500,000 or cancellation of any contract) any owner or Club or League employee for conduct detrimental to the welfare of the League or professional football, *id*. at 30–31, §8.13.

In reality, though they are separate legal entities, the NFL oversees almost every aspect of the Clubs. Indeed, during oral argument before the United States Court of Appeals for the Ninth Circuit in this case, counsel for the NFL repeatedly referred to it as a "super employer" of the Clubs and their doctors and trainers. *See. e.g.*, Oral Argument at 14 min. 20 sec., 19 min. 09 sec., *Dent v. NFL*, 902 F.3d 1109 (9th Cir. 2018) (No. 15-15143), *available at* https://www.ca9.uscourts.gov/media/view_video.php?pk_vid=0000010751. The factual allegations of the TAC are consistent with the "super employer" status of the NFL and, if proven, could establish a separate path toward liability against the NFL beyond its direct actions as identified in the TAC.

Perhaps the clearest proof of the NFL's maintenance of the Business Plan and its involvement in the distribution of Medications is the simple fact that for five decades, hundreds of doctors and trainers across dozens of Clubs scattered across the country have complied with the Business Plan and no one has broken ranks, even when doing so causes them to knowingly violate the law. The clear inference, to which Plaintiffs are entitled at this stage of the proceedings, is that the NFL, as super-employer, and its long-serving personnel such as Dr.

Brown, who has been in his current position since 1990, are maintaining the Business Plan and directly involved in the handling, distribution and administration of the Medications.

C. Defendant Misinterprets the Ninth Circuit's Opinion.

The NFL argues that the Ninth Circuit's opinion in this case required Plaintiffs to prove that the NFL or its personnel physically handed Plaintiffs the Medications. Not so. That decision held that Plaintiffs' claims as pled in their Second Amended Complaint were not preempted by section 301 of the Labor Management Relations Act. *Dent v. NFL*, 902 F.3d 1109 (9th Cir. 2018). And while true that the opinion stated in relevant part that "on remand, any further proceedings in this case should be ***limited to claims*** arising from ***the conduct*** of the NFL and NFL personnel-not the conduct of individual teams' employees," *Dent*, 902 F.3d at 1121, (emphasis added), the Ninth Circuit did not require Plaintiffs to go the extra step claimed now by the NFL and show that its personnel were physically handing out the Medications to Plaintiffs.

To the contrary, the Ninth Circuit explained that "lack of reasonable care in the handling, distribution, and administration of controlled substances can foreseeably harm the individuals who take them. That's why they're controlled in the first place." *Id.* Thus, the Ninth Circuit did not limit the NFL's offending conduct to distribution only – handling and administration suffice – and certainly did not require that Plaintiffs prove that NFL personnel were actually handing out pills or injecting Medications. In fact, the Ninth Circuit clearly said "[r]egardless of what (if anything) the CBAs say about those issues, if the NFL had ***any role in distributing*** prescription drugs, it was required to follow the laws regarding those drugs." *Id.* at 1121 (emphasis added).

Once again, the NFL's selective focus on but a portion of a legal document (in this instance, the Ninth Circuit's opinion) and mischaracterization thereof paints a very different picture than what anyone else would see if they read the document at issue.

II. THE THIRD AMENDED COMPLAINT ADEQUATELY PLEADS NEGLIGENCE.

A negligence cause of action in California consists of the following elements: (1) the existence of a legal duty of care; (2) breach of that duty; and, (3) the proximate cause resulting in injury. *McIntyre v. The Colonies-Pac., LLC*, 228 Cal.App.4th 664, 671 (2014). California recognizes that negligence is the failure to use reasonable care to prevent harm to others; a person is thus negligent if they do something that a reasonably careful person would not do in the same situation or fail to do something that a reasonably careful person would do in the same situation. *Coppola v. Smith*, 935 F.Supp.2d 993, 1013 (E.D. Cal. 2013) (citing *Raven H. v. Gamette*, 157 Cal.App.4th 1017, 1025 (2007)).

Negligence *per se* is not a separate cause of action, but the application of an evidentiary presumption provided by California Evidence Code §669. *Id.* at 1016–17. It is the tort of negligence, and not the violation of the statute itself, which entitles a plaintiff to recover civil damages. *Spencer v. DHI Mortg. Co., Ltd.*, 642 F.Supp.2d 1153, 1162 (E.D. Cal. 2009). To claim negligence *per se*, a plaintiff must allege that: (1) the defendant violated a statute, ordinance, or regulation; (2) the violation proximately caused injury; (3) the injury resulted from an occurrence that the enactment was designed to prevent; and, (4) the plaintiff fits within the class of persons for whose protection the enactment was adopted. CAL. EVID. CODE §669 (West 2018); *see also Coppola*, 935 F.Supp.2d at 1017.

The TAC adequately pleads a claim for both negligence and negligence *per se*.

A. The NFL Owed a Duty of Care to Plaintiffs.

The NFL first argues that Plaintiffs did not establish an independent duty of care. Again, Plaintiffs do not have to establish anything at this point; they simply need to plausibly allege. And that they have done; namely, that duties owed by the NFL to Plaintiffs exist because of the nature of the activity at issue, because the NFL assumed such duties, and because of the "special relationship" that exists between the NFL and its players.

1. The NFL Failed to Exercise Reasonable Care in the Handling, Distribution, and Administration of Controlled Substances.

As discussed *supra*, the Ninth Circuit has already determined that, applying the *Rowland* factors[3], the "lack of reasonable care in the handling, distribution, and administration of controlled substances can foreseeably harm the individuals who take them;" additionally, the Ninth Circuit specifically stated that the *Rowland* factors had been satisfied in *Dent*. 902 F.3d at 1119 ("Carelessness in the handling of dangerous substances is both illegal and morally blameworthy, given the risk of injury it entails. Imposing liability on those involved in improper prescription-drug distribution will prevent harm by encouraging responsible entities to ensure that the drugs are administered safely. And it will not represent an undue burden on such entities, which should already be complying with the laws governing prescription drugs and controlled substances."). In other words, the NFL owed a duty to Plaintiffs because the general character of the conduct at issue, assuming, in fact, the NFL engaged in the handling, distribution and administration of Medications. *Dent*, 902 F.3d at 1119. As discussed *supra* at

[3] The *Rowland* factors consist of: (1) the foreseeability of harm to the plaintiff; (2) the degree of certainty that the plaintiff suffered injury; (3) the closeness of the connection between the defendant's conduct and the injury suffered; (4) the moral blame attached to the defendant's conduct; (5) the policy of preventing future harm; (6) the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise case with resulting liability for breach; and, (7) the availability, cost, and prevalence of insurance for the risk involved. *Rowland v. Christian*, 69 Cal.2d 108, 113 (1968).

§1.B, the TAC adequately alleges such conduct, which forms a duty that is the foundation of Plaintiffs' negligence claims.

2. The NFL Assumed a Duty When it Voluntarily Involved Itself in the Distribution of Medications Decades Ago.

When a person with no affirmative duty to act voluntarily does so, they assume a duty to exercise due care. *Univ. of S. Cal. v. Superior Court of L.A.*, 30 Cal.App.5th 429, 241 Cal.Rptr.3d 616, 630 (App. Ct. 2018). This duty arises, *e.g.*, where a defendant voluntarily undertakes to provide protective services for the plaintiff's benefit and either the defendant's failure to exercise reasonable care increases the risk of harm to the plaintiff or the plaintiff reasonably relies on the undertaking and suffers injury as a result. *Id.* at 623. *See also Mayall on Behalf of H.C.V. v. USA Water Polo, Inc.*, 909 F.3d 1055, 1066–68 (9th Cir. 2018).

The TAC adequately alleges that the NFL voluntarily involved itself in the distribution of Medications to its players. *See supra* §I.B. Indeed, a section of the TAC is titled "The League Voluntarily Undertook a Duty to its Players With Regard to the Administration of Medications," and it details how the League voluntarily undertook to establish a drug program starting in 1973; how that program evolved to its current state with regard to distributing and administering Medications to players, and the various means by which the NFL has voluntarily assumed this duty, including the imposition of Club audits, League-wide policies related to Toradol, and the security and handling of Medications. *See* ECF No. at 51–56.

Plaintiffs have also adequately pled that the NFL's failure to exercise reasonable care has increased the risk of harm to them, *see e.g.*, ECF No. 119 at ¶¶16, 143, 220, and that they reasonably relied on the NFL's undertaking and suffered injury as a result, *see e.g.*, *id.* at ¶¶27, 36, 45, 55, 64, 74, 94, 105.

3. The NFL Owed Plaintiffs a Duty Because They Were in a "Special Relationship."

The NFL also owed a duty of care to Plaintiffs because of the "special relationship" that intertwines the NFL, the Clubs, and players. In *Regents of Univ. of Cal.*, the California Supreme Court held that a university has a duty of care to protect a student from the foreseeable violence of another student during chemistry lab. *Regents of Univ. of Cal. v. Superior Ct.*, 4 Cal.5th 607 (2018). The Court discussed special relationships that create a duty to protect against foreseeable risks, and recognized that "special relationships" share common features.[4] *Id.* at 620. These features include an "aspect of dependency in which one party relies to some degree on the other for protection." *Id.* (citing *Baldwin v. Zoradi*, 123 Cal.App.3d 275, 283 (1981); *Mann v. California*, 70 Cal.App.3d 773, 229–80 (1977)); *see also Kleinknecht v. Gettysburg Coll.*, 989 F.2d 1360 (3rd Cir. 1993) (holding that a college owed a lacrosse player a duty of care based on the special relationship between the college and player in his capacity as an intercollegiate athlete engaged in school-sponsored activity for which he had been recruited). The corollary of dependence is control, with one party dependent and the other having superior control over the means of some protection. *Id.* at 621. "[A] typical setting for the recognition of a special relationship is where plaintiff is particularly ***vulnerable and dependent*** upon the defendant who, correspondingly, has ***some control over the plaintiff's welfare***." *Regents of Univ. of Cal.*, 4 Cal.5th at 621 (citing *Giraldo v. Dep't of Corrs. & Rehab.*, 168 Cal.App.4th 231, 245–46 (2008)) (internal citations omitted) (emphasis added).

[4] That court grounds its analysis in the Restatement Third of Torts, which identifies several special relationships that may support a duty to protect against foreseeable risks. *Regents of Univ. of Cal.*, 4 Cal.5th at 621 (quoting RESTATEMENT (THIRD) OF TORTS: Liability for Physical and Emotional Harm, §40(b) (2010)). Restatement writers have recognized a growing trend in which courts consider a duty to aid or protect in any relationship of dependence or of mutual dependence. RESTATEMENT (SECOND) OF TORTS: §314A, Cmt. B, p. 119 (1965).

One might not think of NFL players as vulnerable, but when it comes to the handling, distribution and administration of controlled substances, they are as vulnerable as any other person in the United States to overuse or misuse and the resulting long-term health problems; to quote the Ninth Circuit, "[t]hat's why they're 'controlled' in the first place." *Dent*, 902 F.3d at 1120. Further, there can be no doubt that the NFL exerts "some control" over its players' medical well-being; regardless, Plaintiffs have adequately pled that the NFL exerts such control. *See e.g.*, ECF No. 119 at ¶¶ 16, 143, 156, 159, 163–64,178–82, and 204. And while true that the duty imposed by a special relationship extends only to foreseeable risks, again, the Ninth Circuit has already explained that the risks complained-of here – long-term health problems – are precisely the foreseeable type of risks that come from mishandling of controlled substances. *Id.*

B. Plaintiffs Have Otherwise Adequately Pled Their Claims.

The NFL next argues that the TAC fails to establish any of the elements of a negligence *per se* claim. The NFL is playing gotcha here; it argues that Plaintiffs have not pled a straight negligence claim and then seeks dismissal by arguing that, even though California does not recognize a negligence *per se* claim, that is what Plaintiffs pled but they did so inadequately. As an initial matter, Plaintiffs pled (and they need not establish) negligence only because, as the NFL recognizes, negligence *per se* is not an independent cause of action under California law, but rather, a doctrine that can be applied to determine the applicable standard of care. One need only look to the Cause of Action section of the TAC, which has but one such cause, Negligence, and in particular, paragraphs 304 and 305, which identify common law duties (discussed *supra*) owed by the NFL to Plaintiffs, and paragraphs 306 and 307, which

distinguish between violations of the law (negligence *per se*) and breaches of duties (negligence).

And Plaintiffs have adequately pled their negligence claim. As discussed *supra*, they have identified three common law duties owed by the NFL to Plaintiffs. And while Plaintiffs need not plead negligence *per se* elements, the federal and state laws cited in the TAC nonetheless play an important role in defining the standard of care, even if the laws themselves do not provide a private cause of action. *See* RESTATEMENT (SECOND) OF TORTS: §285, Cmt. C (1965) ("Even where a legislative enactment contains no express provision that its violation shall result in tort liability, and no implication to that effect, the court may, and in certain types of cases customarily will, adopt the requirements of the enactment as the standard of conduct necessary to avoid liability for negligence."). The Ninth Circuit recognized in this case such a duty under California common law:

> Here, any duty to exercise reasonable care in the distribution of medications does not arise through statute or by contract; no statute explicitly establishes such a duty, and as already noted, none of the CBAs impose such a duty. However, we believe that a duty binding on the NFL – or any entity involved in the distribution of controlled substances – to conduct its activities with reasonable care arises from "the general character of (that) activity….
>
> Of course, establishing that an entity owes a duty does not necessarily establish what standard of care applies, or whether it was breached. But when it comes to the distribution of potentially dangerous drugs, minimum standards are established by statute.

Dent, 902 F.3d at 1119; *see also Verdugo v. Target Corp.*, 59 Cal.4th 312, 326 (2014) ("It is well established under California law that a business establishment's legal obligations to its customers and others may arise…[because of] the Legislature's enactment of a statutory provision."); *Lu v Hawaiian Gardens Casino, Inc.,* 50 Cal.4th 592, 604 (2010) (quoting *Moradi-Shalal v. Fireman's Fund Ins. Cos.*, 46 Cal.3d 287, 304–05 (1988) ("even without a

private right of action under a statute "courts retain jurisdiction to impose civil damages or other remedies … in appropriate common law actions.")).

The TAC is replete with factual allegations that specifically identify how the "general character of" the NFL's maintenance of its Business Plan and its involvement in the distribution of the Medications violate the Controlled Substances Act and the Food Drug and Cosmetic Act (See §III above). This duty is the foundation of Plaintiffs' negligence *per se* claims, regardless of whether either federal statute provides a private right of action against the NFL. *See Beaver v. Tarsadia Hotels*, 29 F.Supp.3d 1294, 1321–22 (S.D. Cal. 2014).

Plaintiffs have also pled breaches of those duties. For example, paragraphs 189–95 of the TAC detail a number of instances over several decades in which NFL personnel knew that the drug program it voluntarily created to monitor the handling and distribution of controlled substances was failing and yet the NFL took no action. Failure to act is the very definition of a breach of a duty. *Curtis v. Q. R. S. Neon Corp.*, 147 Cal.App.2d 186, 195 (1956) ("An act or failure to act in violation of a statute is negligence as a matter of law."); *Johns-Manville Sales Corp. v. Workers' Comp. Appeals Bd.*, 96 Cal.App.3d 923, 930 (1979) ("Gross negligence involves a failure to act under circumstances that indicate a passive and indifferent attitude toward the welfare of others. Negative in nature, it implies an absence of care.").

And causation is not nearly the hurdle that the NFL makes it out to be (though mistakenly in the context of a negligence *per se* claim), at least at this stage of the proceedings. The Ninth Circuit recognized that the injuries complained-of here – long-term health problems – "can be established with certainty, and they are closely connected to the misuse of controlled substances." *Dent*, 902 F.3d at 1119. In other words, it is foreseeable that the NFL's conduct as alleged in the TAC, if true, proximately caused the injuries complained-of here. And under

California law, "issues of breach and causation are questions of fact for the jury." *J.P. ex rel. Balderas v. City of Porterville*, 801 F.Supp.2d 965, 990 (E.D. Cal. 2011) (citing *Lindstrom v. Hertz Corp.*, 81 Cal.App.4th 644, 652 (2000))[5]. In any event, Plaintiffs have adequately alleged that the NFL, through the maintenance of its Business Plan and its failings associated with the handling, distribution and administration of Medications, caused the injuries at issue. *See* ECF No. 119 at 72–77; *id.* at ¶¶269–87; *see e.g.*, *id.* at ¶¶17–19, 25–27, 43–45, 53–55, 62–64, 72–74, 82–84, 91–94, 103–105.

In sum, Plaintiffs have pled, and seek to proceed on, a single negligence claim. They may be able to establish the requisite standard of care for that claim by showing the NFL violated the federal and state laws cited in the TAC, or they may not. But pleading those laws simply preserves for Plaintiffs the ability to simplify the proof they must present relating to certain elements of their negligence claim; as California does not recognize an independent

[5] *See also Ileto v. Glock, Inc.*, 349 F.3d 1191, 1206 (9th Cir. 2003); *Schaeffer v. Gregory Village Partners, L.P.*, 105 F.Supp.3d 951 (N.D. Cal. 2015); *Andrews v. Wells*, 204 Cal.App.3d 533, 538 (1988). *See also Jackson v. AEG Live, LLC*, 233 Cal.App.4th 1156, 1173 (2015) (Breach of duty and proximate cause normally present factual questions); *Clarke v. Hoek*, 174 Cal.App.3d 208, 214 (1985) ("…The province of the jury, as trier of fact, [is] to determine whether an unreasonable risk of harm was foreseeable under the particular facts of a given case…"); *Hatch v. Ford Motor Co.*, 163 Cal.App.2d 393, 397 (1958) ("The reasonableness of a defendant's actions is a quintessential jury question. The duty [of care] having been found to exist, whether it has been breached is a question of fact for the triers of the facts."); *Trujillo v. G.A. Enters, Inc.*, 36 Cal.App.4th 1105, 1109 (1995) (reversing summary judgment on the issue of the reasonableness of defendant's actions, because "whether [defendant] acted reasonably under the circumstances ... [is a] question[ ] of fact to be resolved by trial, not summary judgment); *Saelzler v. Advanced Group 400*, 25 Cal.4th 763, 785 (2001) ("The question of causation long has been recognized as a *factual* one, and it is only where reasonable men [and women] will not dispute the absence of causality." (internal quotations omitted)); *Steinle v. City of San Francisco*, 230 F.Supp.3d 994, 1034 (N.D. Cal. Jan. 6, 2017) (proximate cause is a question of fact which cannot be decided as a matter of law from the allegations of a complaint); *Garman v. Magic Chef, Inc.*, 117 Cal.App.3d 634, 638 (1981) ("Proximate cause is a legal relationship. Whether an act or incident is the proximate cause of injury is a question of law where the facts are uncontroverted and only one deduction or inference may reasonably be drawn from those facts."); *Lacy v. Pacific Gas & Elec. Co.*, 220 Cal. 97, 101 (1934) (explaining that proximate cause is a question of fact for the jury).

cause of action for negligence *per se*, Plaintiffs are not required to plead the elements of such a claim.

III. PLAINTIFFS' CLAIMS ARE NOT TIME-BARRED.

All parties agree that, for present purposes, California's two-year statute of limitations applies to Plaintiffs' negligence claims. But they differ as to when those claims accrued and when Plaintiffs had knowledge of them. Driving this argument is the NFL's intentional misrepresentation of the injuries at issue – while the NFL wants those injuries to be what Plaintiffs suffered on the field, in fact, the injuries are those that accrued much later in Plaintiffs' lives – and failure to understand, or admit, its role in the handling, distribution, and administration of Medications as detailed in the TAC.

The NFL first argues that Plaintiffs' claims are time-barred because their injuries are based on Medications they received more than two years before this suit was filed. Plaintiffs concede that they received the Medications when the NFL contends they did. But that has absolutely nothing to do with the relevant analysis, which, as the NFL correctly notes, is determining when the last element of a claim occurred, which generally is when the claim accrued. The provision of Medications is not the injury complained-of, despite the NFL's fervent wish otherwise; rather, it is the cause of the internal injuries and exacerbated muscular-skeletal injuries that did not occur until after Plaintiffs' NFL careers concluded. For example, Plaintiff Wiley, who had no history of kidney disease, was hospitalized and diagnosed with partial renal failure ***in April 2014***, an injury that did not manifest until well within the applicable statute of limitations. *See* ECF No. 119 at ¶287.

The foregoing argument, in reality, is a red herring, as evidenced by the fact that the NFL spent half a page on it while spending the next four pages on the main event: the

discovery rule. While determining when a claim accrued is a necessary starting point for a statute of limitations analysis, it matters not if all elements of a claim are present if the plaintiff does not know they are present, in which case, what matters is when the plaintiff knew, or should have known, they had a claim. That is the analysis that matters here. To this, the NFL really has no response.

California recognizes the discovery rule and the Ninth Circuit has held that the accrual date of a cause of action is delayed until a plaintiff ***is aware of her injury and its cause***. *Hopkins v. Dow Corning Corp.*, 33 F.3d 1116 (9th Cir. 1994). Under the discovery rule, an action accrues when a plaintiff has "suspicion of one or more of the elements of a cause of action, coupled with knowledge of any remaining elements." *Fox v. Ethicon Endo-Surgery, Inc.*, 35 Cal.4th 797, 806 (2005). However, when a plaintiff "could not have reasonably discovered facts supporting the cause of action within the applicable statute of limitations period," an action does not accrue until "the factual basis for a claim was reasonably discoverable through diligent investigation." *Id.* at 809, 814.

Each of the cases relied on by the NFL for its discussion of the discovery rule state that the limitations period does not accrue until a plaintiff is aware of some wrongdoing. *See, e.g.*, *Jolly v. Eli Lilly & Co.*, 44 Cal.3d 1103, 1110 (1988) ("Under the discovery rule, the statute of limitations begins to run when the plaintiff suspects or should suspect that her injury was caused by wrongdoing, that someone has done something wrong to her."); *Norgart v. Upjohn Co.*, 21 Cal.4th 383, 394, 397 (1999) (statute begins "when, simply put, he at least 'suspects…that someone has done something wrong' to him…or has reason to discover…based on a particular act of wrongdoing"); *Fox*, 35 Cal.4th at 813 ("In our previous cases addressing the discovery rule, we affirmed that … a plaintiff's ignorance of wrongdoing involving a

product's defect will usually delay accrual because such wrongdoing is essential to that cause of action.").[6]

Therefore, as the cases the NFL cites as dispositive demonstrate, the statute of limitations did not begin to run until a plaintiff has sufficient knowledge of their injuries ***and*** the wrongdoing that caused those injuries.

With regard to knowledge, California, like most states, looks to whether the plaintiff had either actual knowledge or constructive knowledge of the injury and wrongdoing. *See Bibeau v. Pac. Nw. Research Found. Inc.*, 188 F.3d 1105, 1108 (9th Cir. 1999). The statute of limitations in this case thus would begin when Plaintiffs had actual or constructive knowledge of their complained-of injuries and the NFL's associated wrongdoing. The TAC alleges that no Plaintiff knew that the NFL's negligence, as described in the TAC, caused the injuries of which they complain until within the applicable statutory period. ECF No. 119 at ¶107. In the context of a 12(b)(6) motion, that allegation must be accepted as true. *Ileto v. Glock Inc.*, 349 F.3d 1191, 1200 (9th Cir. 2003); *Desaigoudar v. Meyercord*, 223 F.3d 1020, 1021 (9th Cir. 2000). Therefore, the only issue here is whether Plaintiffs had constructive knowledge of the injuries and wrongdoing at issue.

California law charges a plaintiff with constructive or presumptive knowledge of an injury "if they have 'information of circumstances to put [them] ***on inquiry***' or if they have '***the opportunity to obtain knowledge*** from sources open to [their] investigation.'" *Fox*, 35 Cal.4th

[6] Further, these cases all state that resolution of the discovery rule is normally a question of fact. *See, e.g.*, *Jolly*, 44 Cal.3d at 1113; *Fox*, 35 Cal.4th at 811 (specifically noting that *Jolly*, 44 Cal.3d 1103 and *Norgart,* 21 Cal.4th 383 were decided at summary judgment); *see also Rodman v. Otsuka America Pharmaceutical, Inc.*, No. 18-cv-03732-WHO, 2018 WL 5848969, at *3 (N.D. Cal. Nov. 6, 2018) (the question of when a plaintiff "becomes aware of her injury so that the statute of limitation would begin to run is a question of fact not susceptible to a motion to dismiss."); *E-Fab, Inc. v Accountants, Inc. Servs.*, 153 Cal.App.4th 1308, 1320 (2007) ("Resolution of the statute of limitations is normally a question of fact.").

at 807–08. The crux of California's discovery rule analysis thus turns on when a plaintiff was on inquiry notice or whether the opportunity existed to inquire. To rely on the discovery rule, "[a] plaintiff whose complaint shows on its face that his claim would be barred without the benefit of the discovery rule must specifically plead facts to show (1) the time and manner of discovery and (2) the inability to have made earlier discovery despite reasonable diligence." *Rodman*, 2018 WL 5848969, at *3 (citing *Rhynes v. Stryker Corp.*, No. 10-5619 SC, 2011 WL 5117168, at *3 (N.D. Cal. 2011)).

The NFL offers three arguments as to why Plaintiffs knew, or should have known, of their claims prior to May 2012. The NFL first argues that Plaintiffs concede they knew of their injuries when they occurred. This argument is not only contrary to the express allegations in the TAC (*i.e.*, Plaintiffs allege they did not know of the wrongdoing until later), but fails because the NFL is again focused here on the wrong injuries. The injuries that occurred on the field are not at issue. For example, Richard Dent (an example the NFL gives) is not suing for torn muscles he suffered in 1983; rather, he is suing because the Business Plan coerced him to return to play far sooner than he should have, thus leading to later in life, exacerbated muscular-skeletal injuries that he would not have suffered had he received the proper rest when he tore those muscles in the first place.

The NFL next argues that Plaintiffs concede they saw doctors after their playing careers who told them that the injuries from which they were suffering may have been caused by the Medications they received while playing in the NFL. But it is all the difference in the world for Plaintiffs to know their injuries were caused by the Medications versus knowing, or having any reason to suspect, that an entity that profited greatly off their backs was involved in the handling, distribution, and administration of those Medications in a way that breached a duty

by violating the law and/or failing to act when it knew it should have. *See Gryczman v. 4550 Pico Partners, Ltd.*, 107 Cal.App.4th 1, 5–6 (2003); *see also April Enters., Inc. v. KTTV*, 147 Cal.App.3d 805, 826–28 (1983) (noting that two overarching principles guiding application of the discovery rule are that: (1) "plaintiffs should not suffer where circumstances prevent them from knowing they have been harmed[;]" and (2) "defendants should not be allowed to knowingly profit from their injuree's ignorance."). Plaintiffs have consistently taken the position in every pleading filed in this case that they did not know of the NFL's wrongdoing and the NFL, in making the instant argument, focuses on half a sentence in paragraph 108 of the TAC regarding the aforementioned doctor visits while conveniently relegating to a footnote the remainder of that sentence: "no doctor ever told them of the League's involvement in the recordkeeping, handling, and distribution of the Medications (nor would one expect them to be able to do so, as none of these doctors had any affiliation with the NFL)."

In any event, the mere fact that, after their careers concluded, some Plaintiffs were told by doctors that their complained-of injuries here could have resulted from the Medications they took in the NFL, without more, does not put those Plaintiffs on notice of wrongdoing. And the "without more" is missing here. For example, Richard Dent played 15 seasons in the NFL. Even if he was properly provided with Medications during that time, he would have been taking far more Medications than the average person at any other job. Thus, the mere fact that he might have been told that the amount of Medications he took could have caused ailments does not mean the amount, in and of itself, was an issue, and he thus would have no reason to think anyone had done anything wrong in providing him with those Medications. In sum, merely connecting ailments to Medications provided by doctors, without more, would not put a reasonable person on notice of wrongdoing. *See Ward v. Westinghouse Can., Inc.*, 32 F.3d

1405, 1407 (9th Cir. 1994) (held that a genuine issue of material fact existed regarding when the plaintiff should have suspected that it was some third party's wrongdoing, rather than computer overuse, that caused his pain and injury, specifically tendonitis).

The NFL's third argument is that Plaintiffs should have been generally aware of the wrongdoing during their NFL careers. As has been shown herein, Plaintiffs had no actual or constructive knowledge of any wrongdoing until November of 2013. In addition, Plaintiffs obviously had no actual or constructive knowledge of the damage to their internal organs until those injuries manifested themselves within the two year statutory period. These injuries were not apparent because they were not the physical injuries that occurred on the field, *i.e.*, a sprained ankle or broken foot; these injuries were heart and nerve damage, blood clots, kidney issues, kidney transplants, renal failure, and heart attacks that happened years after retirement. *See e.g.,* ECF No. 119 at ¶¶273, 278–79, 283, 285, 286–87.

Equally important, Plaintiffs pled that they did talk to doctors and trainers while they were playing but were not told of the harm that might occur as a result of being rushed back to the field, pumped with Medications, as opposed to resting. Thus, they conducted reasonable due diligence and took the opportunity to obtain knowledge but the trusted doctors and trainers from whom they sought such knowledge told them nothing was wrong. *See Sosunova v. Regents of Univ. of Cal.*, 11 Cal.Rptr.2d 130, 133–34 (App. Ct. Aug. 17, 1992) (When a trust relationship exists, the patient is fully entitled to rely upon the doctor's superior professional knowledge, skill, and judgment. The Court held that a genuine issue of material fact existed as to whether dental patient reasonably relied on statements made by trained medical personnel of clinic who assured patient that her injury did not occur from X-rays. The Court reasoned that the plaintiff made a reasonably diligent inquiry as to the negligent cause of her injury, but, due

to reliance on the clinic's assurances, she may have failed to discover the).[7] Additionally, the NFL's argument that Plaintiffs had notice because of a few medical articles is flawed. The mere notion that a few inconspicuous medical studies existed is not evidence of Plaintiffs having any knowledge as they do not fall into a category that would have had access to the articles. ECF No. 119 at ¶¶109–10. In light of the foregoing, no further inquiry was required of Plaintiffs.

Moreover, a person may not speak falsely at the cost of another's expense. *Garcia v. Superior Ct.*, 50 Cal.3d 728 (1990). In *Garcia*, the Court held that a parole officer had a duty to exercise reasonable care in giving the victim information regarding the parolee who ultimately killed her. *Id.* at 736. The parole officer had received information directly from its parolee of his intention to kill the victim, yet the parole officer provided false information to the victim, who reasonably relied on the parole officer's advice. *Id.* It reasoned that although the parole officer did not have a duty to volunteer information, the absence of a duty did not entitle an individual to speak falsely. *Id*.

Finally, all of the Plaintiffs were in their 20s when they were NFL players. When they first entered an NFL locker room, all the veteran players were being pumped full of Medications. ECF No. 119 at ¶¶168, 193, 211. Their doctors and trainers, whom they trusted, were telling them to take the Medications like their teammates and were supplying them freely. *Id.* at ¶¶15, 197, 267. Plaintiffs were also aware that NFL careers are short in duration and that muscular-skeletal injuries were likely to happen to most NFL players. *Id.* at ¶¶5–6, 260. These realities were part of their assumption of normal wear and tear in an NFL career. *Id.* at ¶¶3,

[7] Plaintiffs recognize that N.D. Cal. Local Rule states in pertinent part that "any order or opinion that is designated: "NOT FOR CITATION," pursuant to Civil L.R. 7-14 or pursuant to a similar rule of any other issuing court, may not be cited to this Court, either in written submissions or oral argument…" N.D. Cal. Civil L.R. 3-4(e). Here, the *Sosunova* case is marked as "review denied and ordered not to be officially published." As it is does not state "NOT FOR CITATION," Plaintiffs cite to it. In the event that this Court deems it improper, Plaintiffs request to have the cite excluded from their written submission.

262. A reasonable person in that circumstance would not suspect that the Medications were being given illegally, their muscular-skeletal injuries were being exacerbated by insufficient rest and the NFL's Business Plan was demanding it. *See e.g., Gutierrez v. Mofid*, 39 Cal.3d 892, 899 (1985) (lacking medical knowledge, a plaintiff may reasonably rely upon his negligent physician's soothing disclaimers); *Sanchez v. S. Hoover Hosp.*, 18 Cal.3d 93, 102 (1976) (The patient is fully entitled to rely upon the physician's professional skill and judgment while under his care…It follows, accordingly, that … the degree of diligence required of a patient in ferreting out and learning of the negligent causes of his condition is diminished); *Knapp v. Knapp*, 15 Cal.2d 237, 242 (1940) (In confidential relationships, because facts which would justify investigation in the ordinary case would not excise suspicion where the circumstances show a right to rely upon the representations of another and the same degree to diligence should not be required).

Plaintiffs had no actual or constructive knowledge of their exacerbated muscular-skeletal injuries, damage to their internal organs or any wrongdoing. Further, Plaintiffs asked their NFL doctors and trainers whether there were any issues with the Medications and were told "no;" again, the law does not require Plaintiffs to go further. Finally, given the nature of the relationship between the Plaintiffs and the persons with whom they interacted in the examples provided by the NFL, Plaintiffs were allowed to relax their guard and trust what they were being told.

CONCLUSION

Plaintiffs respectfully request that the Court deny the NFL's Motion to Dismiss.

Dated: February 5, 2019

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I am employed in the City of Baltimore, State of Maryland. I am over the age of 18 and not a party to the within action; my business address is 201 N. Charles St., Suite 2600, Baltimore, MD 21201 and my email address is dfarmer@mdattorney.com.

On February 5, 2019, I caused to be served the following document described as:

PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION TO DISMISS THIRD AMENDED COMPLAINT

on the following interested parties:

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by:

X (BY ELECTRONIC SERVICE VIA CM/ECF SYSTEM) In accordance with the electronic filing procedures of this Court, service has been effected on the aforesaid party(s) above, whose counsel of record is a registered participant of CM/ECF, via electronic services through the CM/ECF system.

_____(BY PERSONAL SERVICE)

_____(BY EMAIL) I am readily familiar with the firm's practice of email transmission; on this date, I caused the above-referenced document(s) to be transmitted by email and that the transmission was reported as complete and without error.

_____(BY MAIL) I am readily familiar with the firm's practice for the collection and processing of correspondence for mailing with the United States Postal Service and the fact that the correspondence would be deposited with the United States Postal Service that same day in the ordinary course of business; on this date, the above-referenced correspondence was placed for

deposit at Baltimore, Maryland and placed for collection and mailing following ordinary business practices.

_____(BY FEDERAL EXPRESS) I am readily familiar with the firm's practice for the daily collection and processing of correspondence for deliveries with the Federal Express delivery service and the fact that the correspondence would be deposited with Federal Express that same day in the ordinary course of business; on this date, the above-referenced document was placed for deposit at Baltimore, Maryland and placed for collection and overnight delivery following ordinary business practices.

I declare under penalty of perjury under the laws of the State of Maryland that the above is true and correct.

Executed on February 4, 2019 at Baltimore, Maryland.

/s/ Desirena J. Farmer
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NATIONAL FOOTBALL LEAGUE

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

RICHARD DENT, et al.,

Plaintiffs,

v.

NATIONAL FOOTBALL LEAGUE,

Defendant.

Case No.: 3:14-CV-02324-WHA

DEFENDANT NATIONAL FOOTBALL LEAGUE'S NOTICE OF MOTION AND MOTION TO DISMISS THIRD AMENDED COMPLAINT

Date: **March 7, 2019**
Time: **8:00 a.m.**
Courtroom: **12 (19th Floor)**
Judge: **Honorable William Alsup**

NOTICE OF MOTION

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on March 7, 2019, at 8:00 a.m., or as soon thereafter as available, in the courtroom of the Honorable William Alsup, located at 450 Golden Gate Avenue, Courtroom 12, 19th Floor, San Francisco, California 94102, Defendant National Football League ("NFL") will and hereby does move for an order dismissing Plaintiffs' Third Amended Complaint ("TAC") (Dkt. No. 119).

STATEMENT OF ISSUES

The TAC should be dismissed under Rule 12(b)(6) of the Federal Rules of Civil Procedure for two independent reasons. *First*, it fails to plead sufficient facts to establish the essential elements of its only claim—negligence. *Second*, even if the facts alleged in the TAC are sufficient to state a claim, those allegations make clear that Plaintiffs' claims are time-barred. This Motion is based on this Notice of Motion and Motion, the Memorandum of Points and Authorities, the pleadings and paper on file in this action, any other such matters upon which the Court may take judicial notice, the arguments of counsel, and any other matter that the Court may properly consider.

Dated: January 16, 2019

SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP

By: */s/ Jack P. DiCanio*
Jack P. DiCanio

Attorneys for Defendant
NATIONAL FOOTBALL LEAGUE

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INTRODUCTION

Plaintiffs' purported "best and final" complaint (Dkt. No. 117 at 1), asserting against the NFL a single cause of action for negligence, should be dismissed with prejudice for failure to state an actionable claim. The Third Amended Complaint ("TAC") ignores the Ninth Circuit's mandate in *Dent v. National Football League*, 902 F.3d 1109 (9th Cir. 2018) that limits any further proceedings on remand to claims arising from the conduct of the NFL and NFL personnel only. Instead, each named Plaintiff seeks damages for injuries allegedly caused by receiving medications provided by Club doctors and athletic trainers, allegedly without the written prescriptions and warnings allegedly required by federal and state statutes. There is no plausible allegation that anyone employed by the NFL dispensed or distributed any medications—controlled substances or otherwise—to any player. Nor does the TAC "establish [under a negligence per se theory] that the relevant statutes apply to the NFL, the NFL violated those statutes, and the alleged violations caused the players' injuries." *Dent*, 902 F.3d at 1121.

Indeed, the TAC is directly contrary to the Ninth Circuit's mandate in *Dent*. The Court clearly outlined the single path forward for Plaintiffs' negligence claim—a direct theory of liability against the NFL. The Ninth Circuit observed:

> [A]t many points in the SAC, the plaintiffs appear to conflate the NFL and the teams. But the plaintiffs are pursuing a theory of direct liability, not vicarious liability. And they have attempted to vindicate virtually identical claims against the clubs themselves in [*Evans*]. *Therefore, on remand, any further proceedings in this case [regarding Plaintiffs' negligence claim] should be limited to claims arising from the conduct of the NFL and NFL personnel—not the conduct of individual teams' employees*. We leave it to the district court to determine whether the plaintiffs have pleaded facts sufficient to support their negligence claim against the NFL.

Dent, 902 F.3d at 1121 (emphasis added). The TAC, however, merely rehashes almost verbatim the same inapposite allegations about the conduct of team doctors and athletic trainers that this Court already found failed to state a claim against the teams in *Evans v. Arizona Cardinals Football Club, LLC*, No. 3:16-cv-01030-WHA, 252 F. Supp. 3d 855 (N.D. Cal. May 15, 2017), ECF No. 224 ("*Evans* Dkt. No. 224").

The TAC also demonstrates that Plaintiffs' claims are barred by the statute of limitations. Plaintiffs allege they were given medications without warnings or prescriptions during their

playing careers in an effort to return them to play, and suffered injuries when they did. Because each of the plaintiffs ended his NFL playing career no later than 2008, each was required to bring his claims no later than 2010. None did so. Their claims accordingly are time-barred.

This Court should dismiss the TAC with prejudice.

BACKGROUND

I. The Court Dismissed Plaintiffs' Original Action

Plaintiffs are nine retired football players (TAC ¶¶ 18, 28, 37, 46, 56, 65, 75, 85, 95) who were employed by various NFL Clubs between 1969 and 2008. (*Id.* ¶ 17.) At least six years—and, in many cases, decades—after their careers ended, Plaintiffs filed this lawsuit on May 20, 2014, asserting nine causes of action. (Dkt. No. 1 ¶¶ 260-384 (amended in Dkt. No. 5, Dkt. No. 65 (the "SAC"), and Dkt. No. 119)).

In September 2014, the NFL filed two motions to dismiss: one seeking dismissal on preemption grounds under Section 301 of the Labor Management Relations Act (LMRA), 29 U.S.C. § 185, and a second seeking dismissal due to the expiration of the limitations period and Plaintiffs' failure to state a claim. On December 17, 2014, this Court granted the preemption motion and found that the second motion was moot. (Dkt. No. 106 at 1.) In ordering dismissal, the Court held that "[t]he essence of plaintiffs' [negligence-based] claim for relief is that the individual clubs mistreated their players and the league was negligent in failing to intervene and stop their alleged mistreatment." (Dkt. No. 106 at 6.) Such a claim was preempted because "determining the extent to which the NFL was negligent in failing to curb medication abuse by the clubs" would require analysis of various CBA provisions. (*Id.* at 12.)

II. The Ninth Circuit Limited the Scope of Remand

On appeal, Plaintiffs argued that, in dismissing their claims, the Court misread their complaint. Their negligence claim was not that the NFL had failed to adequately supervise the medication practices of the Clubs, but rather that the NFL *itself* had distributed and dispensed controlled substances to the players in a manner that violated the law. *See* Opening Brief for Appellant at 9, *Dent v. NFL*, No. 15-15143 (9th Cir. Oct. 9, 2015), ECF No. 22 (arguing that *the NFL* "violated duties established by detailed statutory schemes that regulate the *distribution and*

administration of such Medications") (emphasis added). The Ninth Circuit accepted Plaintiffs' representation that they "are not merely alleging that the NFL failed to prevent medication abuse by the teams, but that the NFL *itself* illegally distributed controlled substances . . . ." *Dent*, 902 F.3d at 1118. Thus, "to the extent the NFL is involved in the distribution of controlled substances, it has a duty to conduct such activities with reasonable care," and "no examination of the CBAs is necessary to determine that distributing controlled substances is an activity that gives rise to a duty of care." *Id.* at 1119-20. Rather, "under the plaintiffs' negligence per se theory, whether the NFL breached its duty to handle drugs with reasonable care can be determined by comparing the conduct of the NFL to the requirements of the statutes at issue." *Id.* at 1119.

In restricting its ruling to preemption, the Ninth Circuit was careful to "express no opinion about the ultimate merits of the players' claims," which "may be susceptible" to a "motion to dismiss for failure to state a claim under Rule 12(b)(6)." *Id.* at 1126. Instead, the Court explicitly left "it to the district court to determine whether the plaintiffs have pleaded facts sufficient to support their negligence claim against the NFL" (as opposed to the Clubs, which were already facing "virtually identical claims" in *Evans*). *Id.* at 1121. And the Ninth Circuit further instructed that "any further proceedings in this case should be limited to claims arising from the conduct of the NFL and NFL personnel – not the conduct of individual teams' employees." *Id.*

III. Plaintiffs' Third Amended Complaint Disregards the Ninth Circuit's Instruction

Following remand, Plaintiffs filed the TAC asserting a single cause of action for negligence. The TAC does not assert any of the other claims from the SAC the Ninth Circuit reviewed, including negligent hiring and retention of the doctors who allegedly "gave" them the medications, negligent misrepresentation, and fraud.[1] Rather, the lone count the TAC asserts is for negligence – specifically, that the NFL was negligent *per se* because it violated federal and state law through its "provision and administration" (TAC ¶¶ 299, 301-02) of medications without the

[1] Thus, although the Ninth Circuit accepted as true the allegation that "the doctors and trainers who actually *provided* medications to players" were employed by the NFL (*Dent v. National Football League*, 902 F.3d 1109, 1118, n.5 (9th Cir. 2018)) (emphasis added), the TAC no longer includes any such allegation, presumably because Plaintiffs know from the *Evans* litigation that it is not true. Instead, Plaintiffs simply "conflate" the NFL and the Clubs by labeling the professionals who actually provided the players with medications as "NFL doctors and trainers."

written prescriptions and warnings required by statute, which Plaintiffs allege "directly and proximately" caused their injuries. (*Id.* ¶ 16.)

Notwithstanding the Ninth Circuit's clear holding that Plaintiffs may not "conflate" the NFL and the Clubs to establish a "theory of direct liability, not vicarious liability," *Dent*, 902 F.3d at 1121, the TAC makes no specific allegation that the NFL distributed or dispensed a single drug to a single player on even one occasion. Instead, the very first paragraph of the TAC asserts that their "allegations . . . are supported by" documents and testimony from various *Club* doctors and trainers from the *Evans* litigation. (TAC ¶ 1.) Plaintiffs allege that the medications they received during the NFL careers "were often administered without a prescription or side effects warnings and with little regard for a player's medical history, potentially-fatal interactions with other medications, or the actual health and recovery from injury of the player." (*Id.* ¶ 15.) But nowhere in the introduction summarizing their claims, or anywhere else in the ninety-page TAC, do Plaintiffs identify anyone from the NFL (as opposed to the Club doctors and trainers) ever providing a single medication to any NFL player. Nor could they, as Plaintiffs well know from the extensive discovery in the *Evans* litigation cited in the TAC that this *never happened*.[2]

The individual Plaintiffs' specific allegations make this abundantly clear. Each describes the circumstances under which he allegedly received controlled substances and prescription medications in violation of law. (*See id.* ¶¶ 17-106.) But for each such incident, Plaintiffs allege that they received these medications from their Club doctors and trainers and not anyone employed by the NFL. (*Id.*) In fact, Plaintiffs attach an exhibit claiming to identify "the names of the Club doctors and trainers [who allegedly provided the medications] for each year through 2008 as provided by the Defendants during discovery in the Evans case." (*Id.* ¶ 106.) Further, for each Plaintiff, the TAC specifies only the conduct of team doctors and trainers (*see, e.g., id.* ¶¶ 21, 30,

[2] To be sure, the TAC contains considerable misleading and inaccurate rhetoric about matters such as the "Opioid Use Problem" and the NFL's supposed "Business Plan" to prioritize profits over player safety. (*See* TAC ¶¶ 2-13.) But such baseless allegations are irrelevant to the single claim in this lawsuit – that the NFL allegedly provided players with controlled substances in a manner that violated the law.

39, 47, 58, 67, 77, 86, 96) in describing the injuries allegedly caused by "the NFL's negligence" (*id.* § VII).

For example, Plaintiff Richard Dent alleges that he received medications from the "*team doctors and trainers*" for the Chicago Bears, the San Francisco 49ers, the Indianapolis Colts and the Philadelphia Eagles. (*Id.* ¶ 21 (emphasis added).) He further alleges that "the person providing the Medication" did not identify the dosage or provide "the statutorily required warnings about side effects of any of the Medications" (*id.* ¶ 22), and that this "wrongful administration of Medications to him" caused the injuries for which he seeks damages in the TAC (*id.* ¶ 25). He also alleges that he "trusted and relied on the NFL's doctors and trainers and would not have taken the Medications in the manner and amount in which he did had the [NFL] provided him with the information it was legally obligated to provide as discussed herein." (*Id.* ¶ 27.)[3]

ARGUMENT

I. PLAINTIFFS FAIL TO STATE A CLAIM AGAINST THE NFL FOR NEGLIGENCE

A. Standard of Review

To survive a motion to dismiss, "a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted); *see also Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Although well-pleaded allegations, and reasonable inferences that may be drawn from those allegations, are accepted as true, "for a complaint to survive a motion to dismiss, the non-conclusory factual content, and reasonable inferences from that content, must be plausibly suggestive of a claim entitling the plaintiff to relief." *Moss v. U.S. Secret Serv.*, 572 F.3d 962, 969 (9th Cir. 2009).

To state a claim for negligence under California law, Plaintiffs must allege that (1) the NFL had a duty or an obligation to conform to a certain standard of conduct for their protection against unreasonable risks; (2) the NFL breached that duty; (3) the breach proximately caused their

[3] Each Plaintiff makes this identical allegation. (*See* TAC ¶ 36 (Newberry); ¶ 45 (Green); ¶ 55 (Hill); ¶ 64 (Van Horne); ¶ 74 (Stone); ¶ 84 (Pritchard); ¶ 94 (McMahon); ¶ 105 (Wiley).)

injuries; and (4) damages. *See Corales v. Bennett*, 567 F.3d 554, 572 (9th Cir. 2009). As in their prior complaint, Plaintiffs invoke the negligence *per se* doctrine. But the TAC fails to state a claim under a negligence *per se* or any other theory.

B. Plaintiffs Do Not Establish an Independent Duty of Care

"Under California law, negligence *per se* is a doctrine, not an independent cause of action." *Dent*, 902 F.3d at 1117. Thus, California courts consistently hold that satisfying the elements of the negligence *per se* doctrine may create a rebuttable presumption that a particular standard of care was breached – but it does not create a duty or satisfy the independent duty requirement of a claim for negligence. *E.g.*, *Cal. Serv. Station & Auto. Repair Ass'n v. Am. Home Assurance Co.*, 62 Cal. App. 4th 1166, 1177 (1998) ("[T]he presumption of negligence concerns the standard of care, not the duty of care."). In other words, negligence *per se* "applies only *after* determining that the defendant owes the plaintiff an independent duty of care." *Id.* at 1180 (emphasis added).

In remanding this case, the Ninth Circuit found that such a duty could arise "in the distribution of medications," with the applicable standard established by statute. *Dent*, 902 F.3d at 1119. However, the Court simply accepted, for purposes of its preemption analysis, Plaintiffs' allegation in the SAC that the NFL itself provided them medications in violation of law, and left to this Court the determination of "whether the plaintiffs have pleaded facts sufficient to support" such a claim. *Id.* at 1121. And in doing so, the Ninth Circuit made clear that Plaintiffs could not "conflate" the conduct of the Club doctors and trainers with the NFL, but rather are "limited to claims arising from the conduct of the NFL and NFL personnel." *Id.*

The TAC does not plead sufficient facts to establish the required duty of care because there are no plausible allegations that *the NFL* distributed or dispensed any medications to Plaintiffs. No Plaintiff identifies anyone from the NFL who allegedly gave them any medications, in violation of law or otherwise. To the contrary, the literal and only plausible reading of their claims is that *Club* doctors and trainers allegedly provided medications without written prescriptions, proper labeling, or warnings regarding side effects and long-term risks that they claim were required by the relevant statutes. Plaintiffs' effort to obfuscate this obvious fact by labeling Club medical personnel as *NFL* doctors and trainers violates the Ninth Circuit's clear prohibition against "conflat[ing]" the conduct

of the Club doctors and trainers with the NFL. *Id.*; s*ee also Kwan v. SanMedica Int'l*, 854 F.3d 1088, 1096 (9th Cir. 2017) (holding that although a court must take all allegations of material fact as true and construe them in favor of the nonmoving party, "[c]onclusory allegations of law and unwarranted inferences . . . are insufficient to avoid dismissal").

Moreover, Plaintiffs cannot establish that the NFL "voluntarily" assumed a duty to comply with the law by citing to various studies, publications, task forces and recommended "best practices" regarding the dispensation of medications to the players. (*See* TAC ¶¶ 159-229.) For example, the TAC contains numerous pages describing the prescription of Toradol by Club physicians to NFL players, including "the Matava task force," the "Tokish Study," a memorandum prepared by the KC Orthopedic Institute regarding the use of Toradol by "NFL teams," and meetings of the Professional Football Athletic Trainers Society ("PFATS"). (*See id.* ¶¶ 164-80.)[4] Apart from the fact that Plaintiffs do not allege that any of the professionals associated with these activities are or were employed by the NFL, these allegations in no way support a claim that *the NFL* distributed or dispensed medications to players.

For the same reason, Plaintiffs' allegations concerning the doctors retained to oversee the NFL's collectively bargained "drug program" (Drs. Riker, Tennant, Lombardo and Brown) and the league's Medical Advisor (Dr. Pellman) (*see id.* ¶¶ 159-61, 183-84) fail to support their claim that the NFL assumed a duty to ensure that the prescription practices of the Club physicians complied with the law. As this Court previously recognized, "no decision in any state (including California) has ever held that a professional sports league owed such a duty to intervene and stop mistreatment by the league's independent clubs." (Dkt. No. 106 at 6.) The Ninth Circuit did not disagree with this observation, but instead held only that the NFL could be responsible under a negligence theory to the extent it actually dispensed or distributed medications to the players in a manner that violated applicable law. Significantly, there is no allegation, nor could there be, that any of these "NFL doctors" ever distributed or dispensed any medications to the players.

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[4] Despite the considerable emphasis on Toradol in the TAC, it is *not* a controlled substance governed by the Controlled Substances Act ("CSA"). Neither are the other non-steroidal anti-inflammatory drugs ("NSAIDs") described in the TAC, including Motrin, Vioxx, Celebrex, Ketorolac, Indocin, or Naprosyn.

In short, taking all of the allegations in the TAC as true, Plaintiffs at most can say that the NFL was of aware, through audits and studies, of information regarding the Clubs' practices in dispensing medications to the players. There are no allegations, however, establishing that such awareness gave rise to a legal duty of care. Plaintiffs have completely failed to show, as the Ninth Circuit required, that the statutes governing the distribution of controlled substances apply to an entity like the NFL, let alone that the NFL breached any of those statutes or caused Plaintiffs' injuries. And despite the Ninth Circuit's clear directive to the contrary, the TAC's claims that the NFL voluntarily assumed a duty to supervise the Clubs' medical practices amounts to nothing more than a claim of vicarious and not direct liability.

C. The TAC Does Not Satisfy *Any* of The Elements of the Negligence *Per Se* Doctrine

Apart from the TAC's failure to sufficiently allege an independent duty of care, it wholly fails to satisfy the negligence *per se* doctrine Plaintiffs invoke to support their negligence claim. The negligence *per se* doctrine requires Plaintiffs to show that: (1) the NFL violated a statute or regulation; (2) the violation caused Plaintiffs' injuries; (3) the injuries resulted from the kind of occurrence the statute or regulation was designed to prevent; and (4) Plaintiffs were members of the class of persons the statute or regulation was intended to protect. *See Carson v. DePuy Spine, Inc.*, 365 F. App'x 812, 815 (9th Cir. 2010). Applying the doctrine to Plaintiffs' claims here, the Ninth Circuit held that a negligence *per se* theory would "require the players to establish that the relevant statutes apply to the NFL, the NFL violated those statutes, and the alleged violations caused the players' injuries." *Dent*, 902 F.3d at 1121. The TAC does not satisfy any of these elements.

1. Plaintiffs cannot establish that the statutes and regulations identified in the TAC apply to the NFL.

Despite Plaintiffs' repeated assertions that the NFL violated the "statutory regime" governing the distribution of controlled substances and prescription medications, the TAC fails to establish that any of the purportedly violated statutes and regulations even apply to the NFL. Plaintiffs reference a list of statutes and regulations that govern the obligations of medical

professionals and "registrants" in distributing and dispensing controlled substances and prescription medications. But Plaintiffs never identify how any of those statutes or regulations apply to the NFL, nor could Plaintiffs do so, because they simply do not apply.

The CSA applies to persons who "manufacture, distribute, dispense, import or export any controlled substances." 21 C.F.R. § 1301.11(a). Specifically, "only persons *actually engaged in such activities* are required to obtain a registration; *related or affiliated persons* who are not engaged in such activities are not required to be registered." *Id.* (emphasis added). Here, the specific allegations regarding the NFL, as opposed to those involving the Club doctors (who are registrants), plainly do not subject the NFL to coverage. As explained, there is no plausible allegation that the NFL distributed or dispensed controlled substances to the Plaintiffs. (Nor is there any allegation that the NFL manufactures, imports, or exports any such substances.) *See Kim v. InterDent, Inc.*, No. C 08-5565 SI, 2010 WL 3155011, at *11 (N.D. Cal. Aug. 3, 2010) (dismissing plaintiff's negligence *per se* claim, which was premised on defendant management company's alleged failures to provide effective controls and procedures for the provision of medications under the CSA, holding that plaintiff failed to show that defendant, which had not distributed medications to end-users (the patients), was subject to the CSA).

Nor does the Federal Food, Drug, and Cosmetic Act ("FDCA") impose any obligations on the NFL related to the conduct alleged in the TAC. By Plaintiffs' own account, the FDCA prohibits physicians from the manufacture or dispensing of drugs that have been "misbranded" and from providing drugs without prescriptions or appropriate warnings. (*See* TAC ¶ 151); *see also*, *e.g.*, 21 U.S.C. § 331 (prohibiting misbranding or adulterating drugs or the manufacture, introduction, or delivery of such drugs). Yet nowhere does the TAC allege that the NFL itself misbranded or adulterated a medication under the FDCA, or introduced any such medication into commerce.[5]

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[5] Although misbranding may occur where, for example, a drug's label fails to include adequate directions for use, *see*, 21 U.S.C. § 352(f), this rule generally does not apply when a physician provides a medication directly to a patient. *See*, *e.g.*, 21 U.S.C. § 353(b)(2) (exempting from requirements of 21 U.S.C. § 352 medications prescribed by a physician under certain circumstances). But in any event, the TAC includes no allegation that the NFL distributed a drug without the label required by Section 352(f) or prescribed a medication without following the *(cont'd)*

For similar reasons, Plaintiffs have not alleged that the California Pharmacy Law (or any other state law) even applies to the NFL. (*See, e.g.*, TAC ¶ 303 (generally alleging that, "[f]or example, the NFL violated the California Pharmacy Law, Cal. Bus. & Prof. Code § 4000, *et seq.*," without citing a single specific provision that applies to the NFL or that the NFL violated).)[6]

Plaintiffs simply refer to a list of statutes and regulations that govern the obligations of medical professionals and "registrants" in distributing and dispensing controlled substances and prescription medications without ever explaining how any of those statutes or regulations apply to the NFL. Because they have not established and cannot establish that the statutes apply to the NFL, their claims should be dismissed for that reason alone. *See Brooks v. Gomez*, No. C10-01873 SBA, 2013 WL 496339, at *12 (N.D. Cal. Feb. 7, 2013) (holding that plaintiff "failed to give the Defendants fair notice of what the claim is and the grounds upon which it rests" because plaintiff only listed statutes and regulations without "alleg[ing] sufficient facts establishing how each Defendant . . . is alleged to have violated the provisions of each of the Acts identified").

2. Plaintiffs cannot establish that the NFL has violated any laws.

The Ninth Circuit made clear that succeeding on the negligence *per se* theory would require Plaintiffs to "establish that . . . the NFL violated th[e] statutes" in question. *Dent*, 902 F.3d at 1121. Plaintiffs have not sufficiently alleged that the NFL has violated any of the cited statutes. Indeed, the TAC fails even to identify which statutes and regulations the NFL allegedly violated, thus warranting dismissal. *See In re Actimmune Mktg. Litig.*, No. C 08-023762010 MHP, 2010 WL 3463491, at *6 (N.D. Cal. Sept. 1, 2010) ("Without knowing which provisions were at issue, it

(cont'd from previous page)
exemption requirements of Section 353(b)(2).

[6] While Plaintiffs generally allege that the NFL violated all fifty states' and the District of Columbia's laws "regulating controlled substances and prescription medications" (TAC ¶¶ 157-58, 302), they fail to identify which states' laws are allegedly implicated by their claims. Indeed, Plaintiffs specifically identify only one such law from one such state. (*Id.* ¶¶ 157, 303.) Accordingly, Plaintiffs fail to "give [the NFL] fair notice of . . . the grounds upon which [the claim] rests." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (internal citation omitted); *see Baidoobonso-Iam v. Bank of Am. (Home Loans)*, No. VC 10-9171 CAS (MANx), 2011 WL 3103165, at *4 (C.D. Cal. July 25, 2011) (dismissing under *Twombly* a claim for violation of "a litany" of statutes where complaint "provide[d] little or no indication of how any of the listed statutes were violated"). Here, the deficiency in Plaintiffs' claims is even more glaring, since the TAC does not even *identify* the statutes allegedly violated.

was impossible to determine whether the [complaint] stated a 'plausible' claim for relief."), *aff'd*, 464 F. App'x 651 (9th Cir. 2011). For example, several of the referenced statutes and regulations define duties owed by registrants exclusively to the DEA. (*See, e.g.*, TAC ¶ 133.) Many of the regulations referenced are merely definitional (*see, e.g.*, *id.* ¶ 122) or discuss only the punishments applicable for various violations (*see, e.g.*, *id.* ¶ 137).

Rather than alleging facts establishing that "the NFL violated those statutes," *Dent*, 902 F.3d at 1121, Plaintiffs impermissibly conflate the NFL and the Clubs and allege that the manner in which the "NFL doctors and trainers" dispensed these medications violated the CSA, FDCA and analogous state laws. With regard to the CSA, Plaintiffs allege:

> For decades, the NFL's lack of appropriate prescriptions, failure to keep proper records, refusal to explain side effects, lack of individual patient evaluation, proper diagnosis and attention, and use of trainers to distribute Schedule II and III controlled substances to its players, including Plaintiffs, individually and collectively violate the foregoing criminal and regulatory regime. In doing so, the NFL not only left its former players injured, damaged and/or addicted, but also committed innumerable violations of the CSA.

(TAC ¶ 143.) The TAC further alleges that the NFL violated the FDCA by dispensing medications without a prescription, warnings about side effects, and the proper FDA-approved label. (*Id.* ¶¶ 151-52, 156.) Finally, the TAC alleges that these same medical practices violated analogous state laws "regulating controlled substances and prescription medications." (*Id.* ¶¶ 157-58.)

These allegations point to purported actions or omissions by the individual *Clubs* (and the doctors and trainers employed by them), as the phrase "use of trainers" confirms. (*See, e.g.*, *id.* ¶¶ 143, 156.) There are no allegations that adequately plead that a single NFL employee violated any of the referenced statutes. Plaintiffs' continual conflation of the NFL, on the one hand, and the Clubs, on the other, cannot sustain a wholly conclusory negligence claim devoid of facts. *See Brooks,* 2013 WL 496339, at *12 (holding that plaintiff "failed to give the Defendants fair notice of what the claim is and the grounds upon which it rests" when plaintiff only listed statutes and regulations without "alleg[ing] sufficient facts establishing how each Defendant . . . is alleged to have violated the provisions of each of the Acts identified"). It also violates the Ninth Circuit's clear directive on remand.

3. Plaintiffs fail to establish that the NFL's alleged statutory violations were the proximate cause of their injuries.

Even if the TAC had alleged facts demonstrating that the NFL was subject to the CSA and FDCA and had violated their terms, it does not plead sufficient facts demonstrating that Plaintiffs' injuries were caused by any conduct specifically attributed to the NFL, a requirement of Plaintiffs' negligence claim. Thus, even if the statutes applied to the NFL, and the NFL somehow could be viewed as responsible for any violations, Plaintiffs cannot possibly demonstrate any discernable connection between the NFL's alleged conduct and their injuries. To the contrary, Plaintiffs themselves allege that their injuries were caused by the specific conduct of *Club* doctors and trainers.[7] (TAC ¶¶ 17-106.)

Moreover, Plaintiffs fail to sufficiently allege a causal connection between the NFL's supposed violations of federal and state laws, on the one hand, and Plaintiffs' injuries on the other. While Plaintiffs assert cursory allegations regarding the "NFL's" purported violations of "recordkeeping" requirements and the supposed "ban on traveling with controlled substances" (*see, e.g.*, TAC ¶¶ 220, 299), the TAC includes no factual allegations that any purported violations of these technical restrictions *caused* Plaintiffs' injuries. *See Williams v. Hilb, Rogal & Hobbs Ins. Servs. of Cal., Inc.*, 177 Cal. App. 4th 624, 643 (2009) (finding that Evid. Code. § 669 (i.e., the negligence per se presumption) was not applicable where party's violation of a labor code (i.e., failure to obtain workers' compensation insurance) was not causally connected to injury). Even if

[7] But even these allegations fall far short of adequately pleading the causation element of Plaintiffs' negligence claim. With regard to their purported musculoskeletal injuries, Plaintiffs merely provided a list of injuries, followed by conclusory allegations that each Plaintiff "believes that [such injuries identified in the foregoing documents] were aggravated, extended, worsened, prolonged, exacerbated, intensified, perpetuated, protracted, or made permanent by the wrongful administration of Medications to [them]." (TAC ¶¶ 25, 34, 43, 53, 62, 72, 82, 91, 103.) These allegations are mere speculation and do not satisfy Plaintiffs' burden of pleading that such injuries were suffered "*as a result of* the anti-inflammatory injection[s] [or other medications they received]." (*Evans* Dkt. No. 224 at 6.) Similarly, Plaintiffs' allegations concerning internal organ injuries are supported by nothing more than the same type of speculative assertions that were discredited in the *Evans* litigation. As in *Evans*, Plaintiffs have attempted to "plead the causation element of their [negligence] claim simply by pointing to some recent internal organ-related problem," "baldly asserting their belief that it directly resulted from their use of medication," but not alleging any facts "whatsoever concerning etiology." (*Id.* at 7.) The TAC, like the complaint in *Evans*, "just arbitrarily blame[s] . . . drugs" for Plaintiffs' injuries, something that this Court has already found insufficient with respect to the causation requirement. (*Id.*)

Plaintiffs could establish that a *Club* (as opposed to the NFL) violated one of these restrictions, such as improperly travelling with medications, this is far from sufficient to satisfy Plaintiffs' obligation to plead that such a violation proximately caused their injuries.

For example, Plaintiff Dent alleges that he was provided medications without warnings or labels that allowed him to return to play earlier than he claims he should. (*See* TAC ¶¶ 22-23.) But nowhere does he allege that any of these injuries were caused, for example, because the medications were improperly stored under the CSA or given to him by a registrant in a state other than which he was registered. Nor does he allege that the actions allegedly taken by the NFL with respect to medications—conducting studies or auditing Clubs' practices—caused his injuries in any way. Nor could he. It would be illogical for Dent to claim injuries from the use of medications in the 1980s and early 1990s were "caused" by NFL actions that took place a decade later. (*See, e.g.*, TAC ¶¶ 163-77 (alleging that NFL undertook studies and audited Clubs following Dent's career).)[8] And even if he could, the TAC makes clear that such actions were not the "proximate" cause of his injuries.

A plaintiff must provide more than a "mere recitation of the causation element." *Dean v. S. Cal. Edison*, No. ED 12-01435-MWF (DTBx), 2013 WL 12143173, at *2 (C.D. Cal. Sept. 17, 2013). Because Plaintiffs have not sufficiently alleged that their injuries are traceable to *any* purported negligent act or omission by the NFL, Plaintiffs' negligence claim should be dismissed. *See id.* (dismissing claim that "lacks specific factual allegations, particularly with regard to the element of causation").

II. ALL OF PLAINTIFFS' CLAIMS ARE TIME-BARRED

California's two-year statute of limitations governs Plaintiffs' claims here. "It is well-settled that in diversity cases federal courts must apply the choice-of-law rules of the forum state." *Ledesma v. Jack Stewart Produce, Inc.*, 816 F.2d 482, 484 (9th Cir. 1987). Under California's "governmental interest" test for choice-of-law issues, "[w]here the conflict concerns a statute of limitations, the governmental interest approach generally leads California courts to apply

[8] The specific allegations of the other Plaintiffs are similarly deficient.

California law," especially where California's statute would bar a claim. *Deutsch v. Turner Corp.*, 324 F.3d 692, 716-17 (9th Cir. 2003).[9] Thus, not only does California's two-year statute of limitations for claims based on personal injury govern Plaintiffs' claims, it also bars them. *See* Cal. Civ. Proc. Code § 335.1; *Fox v. Ethicon Endo-Surgery, Inc.*, 35 Cal. 4th 797, 809 n.3 (2005).

A. Plaintiffs' Claims Are Barred Because They Are Based on Personal Injuries That Occurred More Than Two Years Ago

Plaintiffs filed this action on May 20, 2014, and therefore claims that accrued earlier than May 20, 2012 are time-barred under California's statute of limitations. "[S]tatutes of limitation do not begin to run until a cause of action accrues. . . . Generally speaking, a cause of action accrues at 'the time when the cause of action is complete with all of its elements.'" *Fox*, 35 Cal. 4th at 806 (citation omitted). "[T]he last element to occur is generally, as a practical matter, the injury to the future plaintiff." *Id.* at 809. Here, Plaintiffs' injuries are all allegedly based on pain medications provided to them during their playing careers with the NFL. (*See, e.g.*, TAC ¶¶ 21, 289.) Every Plaintiff retired from the NFL in 2008 or earlier. (*Id.* ¶¶ 18, 28, 37, 46, 56, 65, 75, 85, 95.)[10] Thus, the latest date Plaintiffs could have suffered a related injury was in 2008. It follows that Plaintiffs' causes of action accrued no later than 2008. Absent any tolling, the two-year limitations period ran in 2010. *See Fox*, 35 Cal. 4th at 806, 809. Because Plaintiffs waited until May 20, 2014 to file this action—at least *six years* after sustaining injuries—their claims are time-barred.

B. The Discovery Rule Does Not Save Plaintiffs' Claims

The discovery rule is inapplicable because Plaintiffs cannot sufficiently allege that they had no actual or inquiry notice of their causes of action before May 20, 2012. To the contrary,

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[9] Plaintiffs have not asserted that a different state's statute of limitations should apply. Indeed, in the parties' previous motion to dismiss briefing, Plaintiffs stated that they "do not challenge the NFL's reliance on California law" for the purpose of its statute of limitations defense. (Opp. at 3 n.1, ECF No. 80.) Though Plaintiffs alluded to the possibility that New York law may apply (*id.*), New York's statute of limitations for claims based on personal injury is three years, *See* N.Y. C.P.L.R. § 214. Application of that limitations period would also bar Plaintiffs' claims.

[10] Plaintiff Dent retired in 1997, Plaintiff Newberry retired in 2008, Plaintiff Green retired in 1992, Plaintiff Hill retired in 1979, Plaintiff Van Horne retired in 1993, Plaintiff Stone retired in 2005, Plaintiff Pritchard retired in 1977, Plaintiff McMahon retired in 1996, and Plaintiff Wiley retired in 2006. (TAC ¶¶ 18, 28, 37, 46, 56, 65, 75, 85, 95.)

Plaintiffs allege that they had reason to—and did—suspect that they had been injured by some wrongdoing well before then.

The "discovery rule" is an exception to the statute of limitations that "postpones accrual of a cause of action until the plaintiff discovers, or has reason to discover, the cause of action." *Fox*, 35 Cal. 4th at 807. Under the rule, the statute of limitations begins to run when "the plaintiffs have reason to at least suspect that *a type of wrongdoing* has injured them." *Id.* (emphasis added). A plaintiff's suspicion need only be about "the 'generic' elements of wrongdoing, causation, and harm." *Id.* "[T]he plaintiff[s] may discover, or have reason to discover, the cause of action even if [they] do[] not suspect, or have reason to suspect, the identity of the defendant. That is because the identity of the defendant is not an element of any cause of action." *See Norgart v. Upjohn Co.*, 21 Cal. 4th 383, 399 (1999) (citation omitted).

Moreover, "plaintiffs are charged with presumptive knowledge of an injury if they have 'information of circumstances to put [them] on inquiry' or if they have 'the opportunity to obtain knowledge from sources open to [their] investigation.'" *Fox*, 35 Cal. 4th at 807-08 (alterations in original) (citation omitted). "A plaintiff need not be aware of the specific 'facts' necessary to establish the claim; that is a process contemplated by pretrial discovery." *Jolly v. Eli Lilly & Co.*, 44 Cal. 3d 1103, 1111 (1988). Nor need he or she be aware of the particular legal theory that will support it. *See Norgart*, 21 Cal. 4th at 397. "California law does not require a plaintiff to be certain of the cause of his injury before his cause of action accrues; it merely requires facts sufficient to put a reasonable plaintiff in suspicion that he has been wronged." *Hendrix v. Novartis Pharm. Corp.*, 975 F. Supp. 2d 1100, 1108-09 (C.D. Cal. 2013), *aff'd*, 647 F. App'x 749 (9th Cir. 2016). "So long as a suspicion [of wrongdoing] exists, it is clear that the plaintiff must go find the facts; she cannot wait for the facts to find her." *Jolly*, 44 Cal. 3d at 1111.

Accordingly, for the "discovery rule" to delay accrual of an otherwise time-barred claim, the plaintiff must adequately allege "(1) the time and manner of discovery and (2) the inability to have made earlier discovery despite reasonable diligence." *Fox*, 35 Cal. 4th at 808 (citation omitted). To allege diligence, a plaintiff must establish that he "conduct[ed] a reasonable investigation of all potential causes of that injury." *Id.* "'The burden is on the plaintiff to show

diligence, and conclusory allegations will not withstand' a motion to dismiss." *Darringer v. Intuitive Surgical, Inc.*, No. 5:15-cv-00300-RMW, 2015 WL 4623935, at *4 (N.D. Cal. Aug. 3, 2015) (citation omitted).

The face of the TAC reveals that Plaintiffs had actual or inquiry notice of their claims before May 20, 2012. First, all Plaintiffs *concede* knowledge of the injuries "*at the time of their occurrence*," again, during or before 2008, the most recent year any named Plaintiff retired from the NFL. (TAC ¶¶ 25, 34, 43, 53, 62, 72, 82, 92, 103 (emphasis added).) The allegation that Plaintiffs' "injuries . . . were known only *generally*" but that Plaintiffs lacked knowledge of "the specific nature or details of the injuries" (*see id.* (emphasis added)) is of no legal consequence. *See Jolly*, 44 Cal. 3d at 1111 ("A plaintiff need not be aware of the specific 'facts' necessary to establish the claim; that is a process contemplated by pretrial discovery."). "Once a plaintiff is aware that he has been injured the statute of limitations begins to run." *Baisden v. Bowers*, No. 1:16-cv-00641-LJO-SAB, 2016 WL 2743388, at *2 (E.D. Cal. May 11, 2016).

Plaintiffs also concede that "doctors they saw after their careers concluded did tell them that *some of their ailments might be the result of the amount of Medications they took during their NFL careers*." (TAC ¶ 108 (emphasis added).) Though Plaintiffs do not identify the date of these doctor visits, it is implausible that all visits occurred after May 20, 2012—anywhere from four to 35 years after Plaintiffs' careers ended. (*See id.* ¶¶ 18, 28, 37, 46, 56, 65, 75, 85, 95.)[11]

Finally, the TAC is rife with allegations that confirm that all Plaintiffs had notice that some wrongdoing had caused their injuries during their careers:

- Plaintiff Dent alleges that *in 1983*, he experienced an injury in practice that caused pain "so bad it was difficult for Mr. Dent to sit on the toilet or even walk. Despite being put on several anti-inflammatory drugs and pain killers, *he questioned being put back on the field*. He ended up playing in the last preseason game, *doped up to the point that he could hardly remember playing*." (*Id.* ¶ 23 (emphasis added).)
- Plaintiff Newberry alleges that "in the 2004 season he hurt his left ankle and the team doctors told him it was a sprain. He played most of the season anyway, with the doctors

[11] Indeed, Plaintiffs all but confirm that these visits were earlier than May 20, 2012. They dispute that these visits constitute notice only because the doctors allegedly did not expressly identify the NFL's purported involvement in their medication—not because the visits were within the limitations period. (*See id.* ¶ 108 ("[N]o doctor ever told them of the League's involvement in the recordkeeping, handling, and distribution of the Medications . . . .").)

giving him a significant amount of painkillers. After the season [*i.e. in 2005*], he was told that he had completely torn the ligament in the ankle and he required surgery." (*Id.* ¶ 32.) Plaintiff Newberry further alleges that as early as 2005 and 2006, "*his legs would stop working and he would fall over as if he had been shot*." (*Id.* ¶ 33 (emphasis added).)

- Plaintiff Green alleges that during his career, "the pain got so bad that he demanded to have surgery" and was told "it was his decision." (*Id.* ¶ 41.)
- Plaintiff Van Horne alleges that "during a playoff game . . . on January 13, 1991, *he could not lift his arm*." He was given "two Percodan for the first half and two Percodan for the second half to allow him to play." (*Id.* ¶ 60 (emphasis added).)
- Plaintiff Stone alleges that he "tore his thumb while playing with the Giants" (sometime between 1996 to 2001) and "was told that, if he were a baseball player he would have been out for the season but *because he was a football player, it could wait until the off-season*." (*Id.* ¶ 69 (emphasis added).)
- Plaintiff Pritchard alleges that when he was traded to the Raiders, "the team's head doctor told him his knees were so bad that *he could not keep playing*. Nonetheless, the doctor told the team that Pritchard could play *as long as he could cope with the pain*." (*Id.* ¶ 79 (emphasis added).)
- Plaintiff McMahon alleges that during his career, which spanned from 1982 through 1996, "he *became dependent on painkillers*" and "was taking as many as 100 Percocets per month, even in the off-season." (*Id.* ¶ 88 (emphasis added).)
- Plaintiff Wiley alleges that he challenged a diagnosis of a groin sprain, given while he was with the Chargers from 2001 to 2003, and "told the team doctor that *the pain seemed more widespread* than a simple groin sprain." After playing through it, he "*decided to seek a second opinion*" and learned that the sprain "was in fact a severe tear of his abdominal wall." (*Id.* ¶ 100-01 (all emphasis added).)
- Plaintiff Hill developed a painkiller addiction, and, as early as 2005 had sought care at drug treatment centers. (*See id.* ¶¶ 276-77.)

These allegations confirm that the Plaintiffs all had sufficient notice of a wrongful cause of their injuries well before May 20, 2012. *See Jolly*, 44 Cal. 3d at 1111 ("So long as a suspicion exists, it is clear that the plaintiff must go find the facts . . . ."); *Mock v. Santa Monica Hosp.*, 187 Cal. App. 2d 57, 66 (1960) ("Certainly, a prudent person would believe that if, in the course of an operation at one point on the body, a serious and painful injury occurred to another part of the body, there was cause for an investigation . . . .").

Because Plaintiffs had suspicion of *some* alleged wrongdoing years before 2014, they were obligated to plead that they could not have made an earlier discovery of the cause of their purported injuries, despite reasonable diligence, in order to save their clearly stale claims. But Plaintiffs have not carried this burden. Not only have Plaintiffs failed to allege that they were

unable to make such an earlier discovery, but they also have failed to adequately plead that they conducted reasonable diligence in the first place. Instead, Plaintiffs merely assert conclusory allegations that they "exercised reasonable diligence to try to discover the facts at issue," without setting forth any *facts* establishing that diligence. While Plaintiffs *have* alleged that, during annual conversations with Club medical staffs, team doctors and trainers did not tell them "about the side effects of the Medications they were being given, the dangers of 'cocktailing' . . . , or of the League's involvement in the recordkeeping, handling, and distribution of the Medications" (TAC ¶ 108), Plaintiffs do not allege what, if any, questions they asked their doctors, whether they inquired into the potential cause of their alleged injuries, and what those doctors told them—other than that several doctors *did* attribute their injuries to "*the amount of Medications they took during their NFL careers*." (*Id.* ¶ 108 (emphasis added).) In short, Plaintiffs provide no details about their diligence and claimed inability to discover their injuries before May 20, 2014, and, as such, they cannot rely on the discovery rule to toll the statute of limitations. Accordingly, Plaintiffs' time-barred claims cannot be saved.

CONCLUSION

For the reasons stated above, Plaintiffs' Third Amended Complaint should be dismissed with prejudice.

Dated: January 16, 2019

SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP

By: */s/ Jack P. DiCanio*
Jack P. DiCanio

Attorneys for Defendant
NATIONAL FOOTBALL LEAGUE

CERTIFICATE OF SERVICE

I hereby certify that on January 16, 2019, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will send a notice of electronic filing to counsel of record for Plaintiffs and which constitutes service under L.R. 5-1(h)(1).

Dated: January 16, 2019

/s/ Jack P. DiCanio
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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

RICHARD DENT, et al.,

Plaintiffs,

v.

NATIONAL FOOTBALL LEAGUE,

Defendant.

Case No.: 3:14-CV-02324-WHA

[PROPOSED] ORDER GRANTING DEFENDANT NATIONAL FOOTBALL LEAGUE'S MOTION TO DISMISS THIRD AMENDED COMPLAINT

Date: **March 7, 2019**
Time: **8:00 a.m.**
Courtroom: **12 (19th Floor)**
Judge: **Honorable William Alsup**

ER 122

Before the Court is Defendant National Football League's ("Defendant") Motion to Dismiss Plaintiffs' Third Amended Complaint for Failure to State a Claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure ("Motion to Dismiss"). Having considered the written submissions by the parties, all other papers on file herein, and oral argument, the Court hereby GRANTS Defendant's Motion to Dismiss. The Third Amended Complaint is DISMISSED with prejudice.

IT IS SO ORDERED.

Dated: _____

_____
THE HONORABLE WILLIAM ALSUP
UNITED STATES DISTRICT COURT JUDGE

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RICHARD DENT; JEREMY NEWBERRY; ROY GREEN; J. D. HILL; KEITH VAN HORNE; RON STONE; RON PRITCHARD; JAMES MCMAHON; MARCELLUS WILEY; JONATHAN REX HADNOT, JR., On Behalf of Themselves and All Others Similarly Situated, *Plaintiffs-Appellants*, v. NATIONAL FOOTBALL LEAGUE, a New York unincorporated association, *Defendant-Appellee.*	No. 15-15143 D.C. No. 3:14-cv-02324-WHA OPINION

Appeal from the United States District Court
for the Northern District of California
William Alsup, District Judge, Presiding

Argued and Submitted December 15, 2016
San Francisco, California

Filed September 6, 2018

Before: Richard C. Tallman,* Jay S. Bybee, and N. Randy Smith, Circuit Judges.

Opinion by Judge Tallman

SUMMARY**

Labor Law

The panel reversed the district court's dismissal on preemption grounds of an action alleging a variety of state-law claims brought against the National Football League ("NFL") by former professional football players, and remanded for further proceedings.

The putative class of retired NFL players alleged that the NFL distributed controlled substances and prescription drugs to its players in violation of both state and federal laws, and that the manner in which these drugs were administered left the players with permanent injuries and chronic medical conditions.

The panel held that the district court erred in holding that the players' claims were preempted by § 301 of the Labor Management Relations Act. The panel held that as pled, the

* Judge Tallman was drawn to replace Circuit Judge Alex Kozinski when Judge Kozinski retired. Judge Tallman has read the briefs and viewed the digital recording of oral argument. The panel has also reconferenced on the case.

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

players' claims neither arose from collective bargaining agreements ("CBA") nor required their interpretation. Specifically, the panel held that plaintiffs' negligence claim regarding the NFL's alleged violation of federal and state laws governing controlled substances was not preempted by § 301. The panel also held that the players' negligent hiring and retention claims, and their negligent misrepresentation claim, were not preempted because they could be evaluated without interpreting the CBAs. The panel further held that the NFL had not identified any CBA provisions that must be interpreted in order to resolve the players' fraud claims, and resolving those claims did not require interpreting CBA provisions.

The panel held that the players' loss of consortium claim, and their requests for declaratory judgment and medical monitoring were derivative of their other claims. Because those claims were not preempted, the panel reversed the dismissal of the derivative claims and remanded.

The panel rejected the NFL's argument that the dismissal should be affirmed on the ground that the players failed to exhaust the grievance procedures required by the CBAs.

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OPINION

TALLMAN, Circuit Judge:

This appeal requires us to decide whether a variety of state-law claims brought against the National Football League (NFL) by former professional football players are preempted by § 301 of the Labor Management Relations Act (LMRA), 29 U.S.C. § 141.

The district court held that the players' claims are preempted and dismissed their suit. We disagree. As pled, the players' claims neither arise from collective bargaining agreements (CBAs) nor require their interpretation. Therefore, we reverse and remand for further proceedings.

I

The NFL is an unincorporated association of thirty-two independently owned and operated football "clubs," or teams. The NFL "promotes, organizes, and regulates professional football in the United States," *Williams v. Nat'l Football League*, 582 F.3d 863, 868 (8th Cir. 2009), but it

does not employ individual football players; they are employees of the teams for whom they play.

Richard Dent is a retired football player who played on four different NFL teams during his fourteen-year career. During that time, doctors and trainers allegedly gave him "hundreds, if not thousands" of injections and pills containing powerful painkillers in an effort to keep him on the field. According to Dent, he was never warned about the potential side effects or long-term risks of the medications he was given, and he ended his career with an enlarged heart, permanent nerve damage in his foot, and an addiction to painkillers.

Since 1968, the NFL, its member teams, and NFL players have been bound by a series of CBAs[1] negotiated by the NFL Players' Association (the players' bargaining unit) and the NFL Management Council (the teams' bargaining unit).[2] Since 1982, the CBAs have included provisions regarding "players' rights to medical care and treatment." Those provisions have changed somewhat over the years, but generally speaking, they have required teams to employ board-certified orthopedic surgeons and trainers who are certified by the National Athletic Trainers Association, and they have guaranteed players the right to access their medical records, obtain second opinions, and choose their own surgeons. The CBAs impose certain disclosure requirements on team doctors; for example, the 1982 CBA

[1] There have been two periods of time when a CBA was not in force: from August 1987 to March 1993, and from March 2011 to August 2011. Those gaps in CBA coverage are irrelevant to this action.

[2] Until 2011, the NFL itself was not a signatory to the CBAs. However, even prior to 2011, the CBAs were binding on all the relevant entities, including the NFL.

established that "[i]f a Club physician advise[d] a coach or other Club representative of a player's physical condition which could adversely affect the player's performance or health, the physician [would] also advise the player." The 1993 CBA added the requirement that "[i]f such condition could be significantly aggravated by continued performance, the physician [would] advise the player of such fact in writing." The 2011 CBA established that team physicians "are required to disclose to a player any and all information about the player's physical condition" that the physicians disclose to coaches or other team representatives, "whether or not such information affects the player's performance or health."

In 2014, Dent and nine other retired players filed a putative class action suit against the NFL in the Northern District of California, seeking to represent a class of more than 1,000 former players. They alleged that since 1969, the NFL has distributed controlled substances and prescription drugs to its players in violation of both state and federal laws, and that the manner in which these drugs were administered left the players with permanent injuries and chronic medical conditions.

Like Dent, the other named plaintiffs allege that during their years in the NFL, they received copious amounts of opioids, non-steroidal anti-inflammatory medications, and local anesthetics. The complaint claims the NFL encouraged players to take these pain-masking medications to keep players on the field and revenues high, even as the football season got longer and the time between games got shorter, increasing their chances of injury. According to the players, they "rarely, if ever, received written prescriptions . . . for the medications they were receiving." Instead, they say they were handed pills in "small manila envelopes that often had

no directions or labeling" and were told to take whatever was in the envelopes. During their years of consuming these powerful medications, it is further alleged that no one from the NFL warned them about potential side effects, long-term risks, interactions with other drugs, or the likelihood of addiction. The plaintiffs claim that as a result of their use (and overuse) of these drugs, retired players suffer from permanent orthopedic injuries, drug addictions, heart problems, nerve damage, and renal failure.

Each team hires doctors and trainers who attend to players' medical needs. Those individuals are employees of the teams, not the NFL. But the players' Second Amended Complaint (SAC) asserts that the NFL itself directly provided medical care and supplied drugs to players. For example, the SAC alleges that:

- "The NFL directly and indirectly supplied players with and encouraged players to use opioids to manage pain before, during and after games in a manner the NFL knew or should have known constituted a misuse of the medications and violated Federal drug laws."

- "The NFL directly and indirectly administered Toradol on game days to injured players to mask their pain."

- "The NFL directly and indirectly supplied players with NSAIDs, and otherwise encouraged players to rely upon NSAIDs, to manage pain without regard to the players' medical history, potentially fatal drug interactions or long-term health consequences of that reliance."

- "The NFL directly and indirectly supplied players with local anesthetic medications to mask pain and other symptoms stemming from musculoskeletal injury when the NFL knew that doing so constituted a dangerous misuse of such medications."

- "NFL doctors and trainers gave players medications without telling them what they were taking or the possible side effects and without proper recordkeeping. Moreover, they did so in excess, fostering self-medication."

- "[M]edications are controlled by the NFL Security Office in New York . . . ."

- "The NFL made knowing and intentional misrepresentations, including deliberate omissions, about the use and distribution of the Medications."

The named plaintiffs sought to represent a class of plaintiffs who had "received or were administered" drugs by anyone affiliated with the NFL or an NFL team. They filed claims for negligence per se, negligent hiring and retention, negligent misrepresentation, fraudulent concealment, fraud, and loss of consortium. They sought relief including damages, injunctive relief, declaratory relief, and medical monitoring.

The NFL filed two motions to dismiss, one arguing that the players' claims were preempted by § 301 of the LMRA and the other arguing that the players failed to state a claim and their claims were time barred. The district court held a hearing on the preemption issue. It granted the NFL's motion to dismiss on preemption grounds and denied the NFL's other motion to dismiss as moot. The players timely appealed.

We have jurisdiction under 28 U.S.C. § 1291. We review de novo the district court's finding of preemption under § 301. *Cramer v. Consol. Freightways, Inc.*, 255 F.3d 683, 689 (9th Cir. 2001), *as amended* (Aug. 27, 2001).

II

Section 301 of the LMRA is a jurisdictional statute that has been interpreted as "a congressional mandate to the federal courts to fashion a body of federal common law to be used to address disputes arising out of labor contracts." *Kobold v. Good Samaritan Reg'l Med. Ctr.*, 832 F.3d 1024, 1032 (9th Cir. 2016) (quoting *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 209 (1985)). Congress intended for § 301 to "protect the primacy of grievance and arbitration as the forum for resolving CBA disputes and the substantive supremacy of federal law within that forum." *Alaska Airlines Inc. v. Schurke*, — F.3d —, No. 13-35574, 2018 WL 3636431, at *7 (9th Cir. Aug. 1, 2018) (en banc) (emphasis omitted). Accordingly, § 301 preempts state-law claims "founded directly on rights created by collective-bargaining agreements, and also claims 'substantially dependent on analysis of a collective-bargaining agreement.'"[3] *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 394 (1987) (quoting *Int'l Bhd. of Elec. Workers v. Hechler*, 481 U.S. 851, 859 n.3 (1987)). Conversely, claims are not preempted where the rights at issue are "conferred by state law, independent of the CBAs" and "the matter at hand can be

[3] Section 301 preemption has a long history, which we will not fully recount here. An interested reader may refer to our opinions in *Kobold*, 832 F.3d 1024, *Burnside v. Kiewit Pac. Corp.*, 491 F.3d 1053 (9th Cir. 2007), and *Cramer*, 255 F.3d 683, for more information on the history of the LMRA and the development of the preemption doctrine.

resolved without interpreting the CBAs." *Burnside*, 491 F.3d at 1058.

We conduct a two-step inquiry to determine whether state-law claims are preempted by § 301. First, we ask whether the cause of action involves "rights conferred upon an employee by virtue of state law, not by a CBA." *Id.* at 1059. If the rights at issue "exist[] solely as a result of the CBA, then the claim is preempted, and our analysis ends there." *Id.*

Second, if the right exists independently of the CBA, we "ask whether litigating the state law claim nonetheless requires interpretation of a CBA, such that resolving the entire claim in court threatens the proper role of grievance and arbitration." *Schurke*, 2018 WL 3636431, at *8. A claim that requires interpretation of a collective bargaining agreement is preempted. *Burnside*, 491 F.3d at 1059–60. "'Interpretation' is construed narrowly; it means something more than 'consider,' 'refer to,' or 'apply.'" *Schurke*, 2018 WL 3636431, at *8. (quotation omitted). At this second step, "claims are only preempted to the extent that there is an active dispute over the meaning of contract terms. A *hypothetical* connection between the claim and the terms of the CBA is not enough to preempt the claim . . . ." *Id.* (quotations omitted).

"The plaintiff's claim is the touchstone" of the § 301 preemption analysis; "the need to interpret the CBA must inhere in the nature of the plaintiff's claim." *Cramer*, 255 F.3d at 691. Therefore, a defense based on a CBA does not give rise to preemption. *Caterpillar*, 482 U.S. at 300. Moreover, "a CBA provision does not trigger preemption when it is only *potentially* relevant to the state law claims, without any guarantee that interpretation or direct reliance on the CBA terms will occur." *Humble v. Boeing Co.*,

305 F.3d 1004, 1010 (9th Cir. 2012). Rather, "adjudication of the claim must require interpretation of a provision of the CBA." *Cramer*, 255 F.3d at 691–92.

Merely consulting a CBA (to, for example, calculate damages or ascertain that an issue is not addressed by the CBA) does not constitute "interpretation" of the CBA for preemption purposes. *See Livadas v. Bradshaw*, 512 U.S. 107, 125 (1994); *Cramer*, 255 F.3d at 693. Similarly, "[t]he need for a purely factual inquiry" that "does not turn on the meaning of any provision of a collective bargaining agreement . . . is not cause for preemption" under § 301. *Burnside*, 491 F.3d at 1072 (quotation omitted); *see also Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 407 (1988) ("Each of these purely factual questions pertains to the conduct of the employee and the conduct and motivation of the employer. Neither of the elements requires a court to interpret any term of a collective-bargaining agreement.").

In sum, for each of the players' claims, we must determine whether the claim arises from the CBAs and, if not, whether establishing the elements of the claim will require interpretation of the CBAs. *Burnside*, 491 F.3d at 1059–60. Because this case was decided on a motion to dismiss, as we perform this analysis we must take the SAC's allegations as true and construe them in the light most favorable to the plaintiffs. *See, e.g.*, *Kwan v. SanMedica Int'l*, 854 F.3d 1088, 1096 (9th Cir. 2017). We must also be mindful of the fact that the "LMRA § 301 forum preemption inquiry is not an inquiry into the merits of a claim; it is an inquiry into the claim's 'legal character'—whatever its merits—so as to ensure it is decided in the proper forum." *Schurke*, 2018 WL 3636431, at *10 (quoting *Livadas*, 512 U.S. at 123–24). Therefore, "[o]ur only job is to decide whether, as pleaded, the claim in this case is 'independent'

of the CBA in the sense of 'independent' that matters for preemption purposes: resolution of the state-law claim does not require construing the collective-bargaining agreement.'" *Id.* (alteration omitted) (quoting *Lingle*, 486 U.S. at 407).

A

To state a claim for negligence in California,[4] a plaintiff must establish the following elements: (1) the defendant had a duty, or an "obligation to conform to a certain standard of conduct for the protection of others against unreasonable risks," (2) the defendant breached that duty, (3) that breach proximately caused the plaintiff's injuries, and (4) damages. *Coarles v. Bennett*, 567 F.3d 554, 572 (9th Cir. 2009) (quoting *McGarry v. Sax*, 70 Cal. Rptr. 3d 519, 530 (Ct. App. 2008)).

The plaintiffs have styled their negligence claim as one for "negligence per se," but under California law, negligence per se is a doctrine, not an independent cause of action. *Quiroz v. Seventh Ave. Ctr.*, 45 Cal. Rptr. 3d 222, 144–45 (Ct. App. 2006). Therefore, we construe the players' claim as a traditional negligence claim, but apply the negligence per se doctrine.

Under that doctrine, a statute may establish the standard of care. Therefore, the defendant's violation of a statute can give rise to a presumption that it failed to exercise due care if it "violated a statute, ordinance, or regulation of a public entity," that violation proximately caused an injury, the

[4] Because plaintiffs seek to represent a nationwide class but have not identified the specific states whose laws govern their claims, we follow the district court in applying California law for illustrative purposes.

injury "resulted from an occurrence of the nature which the statute, ordinance, or regulation was designed to prevent," and the person who suffered the injury "was one of the class of persons for whose protection the statute, ordinance, or regulation was adopted." Cal. Evid. Code § 699(a); *see also Elsner v. Uveges*, 102 P.3d 915, 927 (Cal. 2004). Many state and federal laws govern the administration of controlled substances to alleviate pain.

The players argue that they were injured by the NFL's "provision and administration" of controlled substances without written prescriptions, proper labeling, or warnings regarding side effects and long-term risks, and that this conduct violated the Controlled Substances Act, 21 U.S.C. § 801 *et seq.*; the Food, Drugs, and Cosmetics Act, 21 U.S.C. § 301 *et seq.*; and the California Pharmacy Laws, Cal. Bus. & Prof. Code § 4000 *et seq*.

The district court believed that the "essence" of the plaintiffs' negligence claim "is that the individual clubs mistreated their players and the league was negligent in failing to intervene and stop their alleged mistreatment." However, as we read the complaint, the plaintiffs are not merely alleging that the NFL failed to prevent medication abuse by the teams, but that the NFL *itself* illegally distributed controlled substances, and therefore its actions directly injured players. The SAC alleges that the NFL "directly and indirectly supplied players" with drugs. It also alleges that the NFL implemented a "League-wide policy" regarding Toradol, that "medications are controlled by the NFL Security Office in New York," that "the NFL coordinat[ed] the illegal distribution of painkillers and anti-inflammatories for decades," and that "NFL doctors and

trainers" gave players medications "without telling them what they were taking or the possible side effects."[5]

With that reading of the complaint in mind, we turn to the question whether the plaintiffs' negligence claim is preempted.

The first question is whether the right at issue—the players' right to receive medical care from the NFL that does not create an unreasonable risk of harm—arises from the CBAs. *See Burnside*, 491 F.3d at 1059. It does not. The CBAs do not require the NFL to provide medical care to players, and the players are not arguing that they do. They are not arguing that the NFL violated the CBAs at all, but that it violated state and federal laws governing prescription drugs.

The next question is whether the plaintiffs' claim nevertheless requires interpretation of the CBAs. *See id.* To answer it, we ask whether the plaintiffs can make out each element of a prima facie case for negligence without interpretation of the CBA.

As for the first element, "[a] duty of care may arise through statute or by contract." *J'Aire Corp. v. Gregory*, 598 P.2d 60, 62 (Cal. 1979). It may also be based on "the general character of the activity in which the defendant engaged." *Id.* California courts consider several factors when deciding whether a duty exists, including

[5] The NFL argues that the doctors and trainers who actually provided medications to players were employees of the teams, not the NFL. But at this stage of the litigation, we must take the allegations in the SAC as true. *See Kwan*, 854 F.3d at 1096.

> the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and the consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost and prevalence of insurance for the risk involved.

Regents of Univ. of Cal. v. Superior Court, 413 P.3d 656, 670 (Cal. 2018) (quoting *Rowland v. Christian*, 443 P.2d 561, 564 (Cal. 1968)). These factors "must be evaluated at a relatively broad level of factual generality." *Id.* (quotation omitted).

Here, any duty to exercise reasonable care in the distribution of medications does not arise through statute or by contract; no statute explicitly establishes such a duty, and as already noted, none of the CBAs impose such a duty. However, we believe that a duty binding on the NFL—or any entity involved in the distribution of controlled substances—to conduct its activities with reasonable care arises from "the general character of [that] activity." *See J'Aire Corp.*, 598 P.2d at 62. Applying the *Rowland* factors, lack of reasonable care in the handling, distribution, and administration of controlled substances can foreseeably harm the individuals who take them. That's why they're "controlled" in the first place—overuse or misuse can lead to addictions and long-term health problems. *See, e.g.*, 21 U.S.C. §§ 801(2), 812. These types of injuries can be

established with certainty, and they are closely connected to the misuse of controlled substances.

Carelessness in the handling of dangerous substances is both illegal and morally blameworthy, given the risk of injury it entails. Imposing liability on those involved in improper prescription-drug distribution will prevent harm by encouraging responsible entities to ensure that drugs are administered safely. And it will not represent an undue burden on such entities, which should already be complying with the laws governing prescription drugs and controlled substances. Thus, we conclude that to the extent the NFL is involved in the distribution of controlled substances, it has a duty to conduct such activities with reasonable care.

Of course, establishing that an entity owes a duty does not necessarily establish what standard of care applies, or whether it was breached. But when it comes to the distribution of potentially dangerous drugs, minimum standards are established by statute. The Controlled Substances Act, 21 U.S.C. § 801 *et seq.*; the Food, Drugs, and Cosmetics Act, 21 U.S.C. § 301 *et seq.*; and the California Pharmacy Laws, Cal. Bus. & Prof. Code § 4000 *et seq*., set forth requirements governing how drugs are to be prescribed and labeled.[6] 21 U.S.C. §§ 331, 352, 353(b)(1), 825, 829. Therefore, under the plaintiffs' negligence per se theory, whether the NFL breached its duty to handle drugs with reasonable care can be determined by comparing the conduct of the NFL to the requirements of the statutes at

[6] The NFL argues that these statutes do not apply to the NFL. But this argument goes to the merits of the plaintiffs' negligence per se theory and not to § 301 preemption. We need not and do not consider it here.

issue. There is no need to look to, let alone interpret, the CBAs.

As for causation, whether the NFL's alleged violation of the statutes caused the plaintiffs' injuries is a "purely factual question[]" that "do[es] not 'requir[e] a court to interpret any term of a collective-bargaining agreement.'" *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 261 (1994) (quoting *Lingle*, 486 U.S. at 407).

The Eighth Circuit reached a similar conclusion in *Williams*, 582 F.3d 863. There, NFL players who had been suspended after testing positive for a banned substance brought a variety of claims against the NFL, including common-law claims and a state-law claim based on a Minnesota statute governing drug testing. *Id.* at 872–73. The NFL argued that all the claims were preempted by § 301, but the Eighth Circuit held that the statutory claim was not preempted, because "a court would have no need to consult the [CBA] in order to resolve the Players' [statutory] claim." *Id.* at 876. Instead, "it would compare the facts and the procedure that the NFL actually followed with respect to its drug testing of the Players with [the statute's] requirements." *Id.* Similarly, here, a court would have no need to consult the CBAs to resolve the plaintiffs' negligence claim. Instead, it would compare the NFL's conduct with the requirements of state and federal laws governing the distribution of prescription drugs.

We recognize that the Eighth Circuit held that the *Williams* plaintiffs' common-law claims, including a negligence claim, were preempted by § 301. *Id.* at 881–82. But that negligence claim is distinguishable from the claim here. There, the plaintiffs argued that the NFL was negligent because it failed to warn players that a certain supplement contained a banned substance. *Id.* at 881. But the players

had procured the supplements on their own; in fact, they were taking supplements *against* the advice of the NFL. *Id.* at 869. The Eighth Circuit held that under these circumstances, determining whether the NFL had a duty to warn players about the supplement would require "examining the parties' legal relationship and expectations as established by the CBA and the [Drug] Policy," which explicitly stated that players who took supplements did so "at [their] own risk." *Id.* at 869, 881.

Here, on the other hand, no examination of the CBAs is necessary to determine that distributing controlled substances is an activity that gives rise to a duty of care. The NFL has a duty to avoid creating unreasonable risks of harm when distributing controlled substances that is completely independent of the CBAs. Therefore, unlike in *Williams*, no CBA interpretation is required to determine whether the NFL owed the players a duty and whether it breached that duty.[7]

[7] The NFL also points to *Atwater v. Nat'l Football League Players Ass'n*, 626 F.3d 1170 (11th Cir. 2010). There, the Eleventh Circuit held that a negligence claim arising from the NFL's vetting of financial advisors was preempted by § 301. But in *Atwater*, the NFL's duty to perform such vetting arose from the CBA itself, so the claim was preempted at the first step of the *Burnside* analysis. *See id.* The Eleventh Circuit did go on to say that even if the duty at issue had not arisen from the CBA, it would "still have to consult the CBA to determine the scope of the legal relationship between Plaintiffs and the NFL and their expectations based upon that relationship." *Id.* at 1182. But in that case, the CBA explicitly stated that players were "solely responsible for their personal finances," *id.* at 1181; interpreting that provision would be necessary to establishing the scope of the NFL's duty. Here, there is no analogous CBA provision that must be interpreted in order to establish the scope of the NFL's duty as it concerns the provision of prescription drugs to players.

The NFL argues that to determine what duty, if any, it owed plaintiffs, a court must "interpret the CBAs to determine the scope of the obligations the NFL and Clubs have adopted vis a vis the individual clubs' physicians and trainers." Similarly, the district court noted that the CBAs place medical disclosure obligations "squarely on Club physicians, not on the NFL." But the *teams'* obligations under the CBAs are irrelevant to the question of whether the *NFL* breached an obligation to players by violating the law. The parties to a CBA cannot bargain for what is illegal. *Allis-Chalmers*, 471 U.S. at 212; *see also Cramer*, 255 F.3d at 695. Therefore, liability for a negligence claim alleging violations of federal and state statutes does not turn on how the CBAs allocated duties among the NFL, the teams, and the individual doctors. Regardless of what (if anything) the CBAs say about those issues, if the NFL had any role in distributing prescription drugs, it was required to follow the laws regarding those drugs. To the extent that the plaintiffs allege they were injured by the NFL's violation of those laws, their claims can be assessed without any interpretation of the CBAs.

The district court also stated that the negligence claim was preempted because "in deciding whether the NFL has been negligent . . . it would be necessary to consider the ways in which the NFL has indeed stepped forward and required proper medical care," i.e., the provisions of the CBAs that establish minimum standards for the medical care teams provide to players. We are not so sure. The negligence analysis is not an equation, whereby one careless act can be canceled out by a careful act in a related arena—especially when the careful act is to be performed by a different party. In other words, the fact that the CBAs require *team* doctors to advise players in writing if a medical condition "could be significantly aggravated by continued

performance" does not address the *NFL's* liability for injuring players by illegally distributing prescription drugs.

We express no opinion regarding the merits of the plaintiffs' negligence claim, which will require the players to establish that the relevant statutes apply to the NFL, the NFL violated those statutes, and the alleged violations caused the players' injuries. Perhaps plaintiffs can prove these elements; perhaps not. That must await completion of discovery. We hold only that the plaintiffs' negligence claim regarding the NFL's alleged violation of federal and state laws governing controlled substances is not preempted by § 301.

We do note that at many points in the SAC, the plaintiffs appear to conflate the NFL and the teams. But the plaintiffs are pursuing a theory of direct liability, not vicarious liability. And they have attempted to vindicate virtually identical claims against the clubs themselves in separate litigation.[8] Therefore, on remand, any further proceedings in this case should be limited to claims arising from the conduct of the NFL and NFL personnel—not the conduct of individual teams' employees. We leave it to the district

[8] *See Evans v. Arizona Cardinals Football Club, LLC*, No. C 16-01030, 2016 WL 3566945 (N.D. Cal. July 1, 2016) (holding that players' claims against teams were not preempted by § 301, and denying teams' motion to dismiss); *Evans v. Arizona Cardinals Football Club, LLC*, 252 F. Supp. 3d 855 (N.D. Cal. May 15, 2017) (granting teams' motion to dismiss players' amended complaint as to certain claims, and granting summary judgment for teams on some remaining claims); *Evans v. Arizona Cardinals Football Club, LLC*, 262 F. Supp. 3d 935 (N.D. Cal. July 21, 2017) (granting summary judgment for teams on all remaining claims), *appeal docketed*, No. 17-16693 (9th Cir. 2017).

court to determine whether the plaintiffs have pleaded facts sufficient to support their negligence claim against the NFL.

B

Ordinarily, "[a]n employer may be liable to a third person for the employer's negligence in hiring or retaining an employee who is incompetent or unfit." *Phillips v. TLC Plumbing, Inc.*, 91 Cal. Rptr. 3d 864, 868 (Cal. Ct. App. 2009) (quotation omitted). To establish liability, a plaintiff must demonstrate the familiar elements of negligence: duty, breach, proximate causation, and damages. *Id.* There are "two elements necessary for a duty to arise in negligent hiring and negligent retention cases—the existence of an employment relationship *and* foreseeability of injury." *Id.* at 870–71 (quoting *Abrams v. Worthington*, 861 N.E.2d 920, 924 (Ohio Ct. App. 2006)).

The SAC alleges that "NFL doctors and trainers gave players medications without telling them what they were taking or the possible side effects and without proper recordkeeping." It also alleges that the NFL hired individuals "charged with overseeing, evaluating, and recommending changes to distribution of Medications," and that the NFL knew or should have known that those individuals were incompetent. As a result, the players say they were "deceived about the nature and magnitude of the dangers to which they were subjected by the Medications" and ultimately injured.

If the NFL did in fact hire doctors and trainers to treat players, or hire individuals to oversee the league's prescription-drug regime, there is clearly an employment relationship between the NFL and those individuals. Injury arising from their incompetence is foreseeable, given the dangers associated with controlled substances. *See*

21 U.S.C. §§ 801(2), 812. Therefore, to the extent that the NFL employed such individuals, it had a common-law duty to use reasonable care in hiring and retaining them.

That duty did not arise from the CBAs, which do not require the NFL to hire employees to treat players or oversee the distribution of medications. Nor does determining whether the NFL breached that duty require interpreting the CBAs, which—because they do not require the NFL to hire such employees in the first place—do not specify any qualifications for them. Thus, the plaintiffs' negligent hiring and retention claims are not preempted by § 301. *See Burnside*, 491 F.3d at 1059; *Ward v. Circus Circus Casinos, Inc.*, 473 F.3d 994, 999 (9th Cir. 2007) (holding plaintiff-employees' negligent hiring, training, and supervision claims were not preempted because they did "not invoke or refer to any duty arising from the CBA" and did not require interpretation of the CBA).

The NFL has not identified CBA provisions whose interpretation would be *required* in order to adjudicate the negligent hiring and retention claims. *See Cramer*, 255 F.3d at 691–92. The NFL argues, and the district court held, that a court could not assess these claims without interpreting various CBA provisions regarding medical care, including the requirement that each team retain a "board-certified orthopedic surgeon" and that all full-time trainers be "certified by the National Athletic Trainers Association." But those provisions relate to the *teams*' obligations, not the NFL's.

We recognize that it is not entirely clear that the NFL *did* hire doctors, trainers, or individuals to supervise medications. The complaint provides very little detail about the employees who were purportedly "charged with overseeing" medication distribution, and the SAC is devoid

of any allegation of an agency relationship that would render the NFL liable for the conduct of particular doctors who treated specific players.

But if the plaintiffs have failed to make the factual allegations necessary to support their claim, that is a pleading problem, not a preemption problem. The issue in this appeal is not whether plaintiffs have plausibly pled the NFL's liability, but whether plaintiffs' claims *as pled* are preempted. *See Schurke*, 2018 WL 3636431, at *10. We hold that the players' negligent hiring and retention claims are not preempted, because they can be evaluated without interpreting the CBAs.

C

To state a claim for negligent misrepresentation, a plaintiff must allege "[m]isrepresentation of a past or existing material fact, without reasonable ground for believing it to be true, and with intent to induce another's reliance on the fact misrepresented; ignorance of the truth and justifiable reliance on the misrepresentation by the party to whom it was directed; and resulting damage." *Shamsian v. Atlantic Richfield Co.*, 132 Cal. Rptr. 2d 635, 647 (Ct. App. 2003). As with all negligence claims, "responsibility for negligent misrepresentation rests upon the existence of a legal duty . . . owed by a defendant to the injured person." *Eddy v. Sharp*, 245 Cal. Rptr. 211, 213 (Ct. App. 1988).

The plaintiffs argue that the NFL "continuously and systematically" misrepresented the risks associated with the medications at issue, that they reasonably relied on those misrepresentations, and they were injured as a result.

As we have said, none of the CBA provisions address the NFL's responsibilities with regard to the distribution of

prescription drugs. Thus, any duty the NFL had to act with reasonable care when making representations regarding the medications arises from state law, not the CBAs. Therefore, the question is whether assessing the plaintiffs' negligent misrepresentation claim will require interpretation of the CBAs. *See Burnside*, 491 F.3d at 1059. We hold that it will not.

Whether the NFL made false assertions, whether the NFL knew or should have known they were false, whether the NFL intended to induce players' reliance, and whether players justifiably relied on the NFL's statements to their detriment, are all factual matters that can be resolved without interpreting the CBAs. *See Galvez v. Kuhn*, 933 F.2d 773, 778 (9th Cir. 1991) ("[T]he question in this case is simply a factual issue and one of intent . . . . Interpretation of the CBA can hardly help resolve these factual questions."). As for the NFL's duty, if the players are correct that the NFL directly supplied drugs to them, then the NFL certainly owed them a duty to exercise reasonable care when making representations about those drugs. *See Shamsian*, 132 Cal. Rptr. 2d at 647; *see also Garcia v. Superior Court*, 789 P.2d 960, 964 (Cal. 1990) (holding that although a parole officer had no duty to make disclosures about the dangerousness of a parolee, once he chose to do so, he "had a duty to use reasonable care").

The NFL argues that assessing the scope of the NFL's duty would require interpreting CBA provisions related to medical care, including those that give players the right to access medical facilities, view their medical records, and obtain second opinions. But these provisions do not relate to the *NFL's* duty to use reasonable care when making representations about the safety of medications.

The NFL also argues that it is impossible to assess whether the plaintiffs reasonably relied on the NFL's representations without interpreting CBA provisions related to team doctors' disclosure obligations. But California law does not require a detailed weighing of various parties' disclosure responsibilities to determine whether reliance was justified; the question is whether the "circumstances were such to make it reasonable for [the plaintiffs] to accept [the defendants'] statements without an independent inquiry or investigation." *See Goodwardene v. ADP, LLC*, 209 Cal. Rptr. 3d 722, 744 (Ct. App. 2016) (quoting *OCM Principal Opportunities Fund, L.P. v. CIBC World Mkts. Corp.*, 68 Cal. Rptr. 3d 835, 864 (Ct. App. 2007)). Plaintiffs are denied recovery for lack of justifiable reliance "only if [their] conduct is manifestly unreasonable in the light of [their] own intelligence or information." *OCM Principal*, 68 Cal. Rptr. 3d at 865 (quotation marks and citation omitted). We need only "look to" the CBAs to determine that none of them contain any provisions that would render reliance on the NFL's representations regarding prescription drugs manifestly unreasonable. *See Cramer*, 255 F.3d at 692.

We acknowledge that two of our sister circuits have held misrepresentation claims by NFL players preempted because determining whether players' reliance was reasonable would require interpreting the CBAs. *See Williams*, 582 F.3d at 881; *Atwater*, 626 F.3d at 1183. But in both of those cases, specific provisions in the CBAs arguably rendered the players' reliance on the NFL's representations unreasonable, which meant that interpretation of the CBAs would be required to assess the plaintiffs' claims.

In *Atwater*, players brought claims based on the NFL's alleged negligence in conducting background checks on

potential financial advisers. 626 F.3d at 1174–75. But the CBA provision that dealt with the relevant program explicitly stated that players were "solely responsible for their personal finances." *Id.* at 1181. The Eleventh Circuit held that determining whether the plaintiffs' reliance on the NFL's representations was reasonable would require interpreting that particular provision. *Id.* at 1182.

In *Williams*, players argued that the NFL owed them a duty to disclose that a certain dietary supplement contained a banned substance, even though the NFL itself "strongly encourage[d] [players] to avoid the use of supplements altogether." 582 F.3d at 869, 881. But the NFL's drug policy, which had been incorporated into the CBA, stated that "if you take these products, you do so AT YOUR OWN RISK!" and that "a positive test result will not be excused because a player was unaware he was taking a Prohibited Substance." *Id.* at 868. The Eighth Circuit stated that the reasonableness of the players' reliance on the absence of a warning about the supplement could not "be ascertained apart from [those] terms of the Policy." *Id.* at 882.

Here, unlike in *Atwater* or *Williams*, no CBA provisions directly address the subject of the litigation: who was responsible for disclosing the risks of prescription drugs provided to players by the NFL. In *Atwater* and *Williams*, the nature of the claims and the content of the CBAs meant that adjudicating the claim would require interpreting the CBAs. But here, no provisions of the CBAs even arguably render the players' reliance on the NFL's purported representations unreasonable.[9] Therefore, interpretation of

[9] The only possible exception to this statement is a disclaimer in the 2011 CBA which states that nothing in the agreement should "be deemed to impose or create any duty or obligation upon either the League or the

the CBAs will not be required, and the negligent misrepresentation claim is not preempted.

D

The elements of fraud are (1) misrepresentation; (2) knowledge of falsity; (3) "intent to defraud, i.e., to induce reliance;" (4) justifiable reliance; and (5) resulting damage. *Engalla v. Permanente Med. Grp., Inc.*, 938 P.2d 903, 917 (Cal. 1997). The elements of fraudulent concealment are "(1) concealment or suppression of a material fact; (2) by a defendant with a duty to disclose the fact to the plaintiff; (3) the defendant intended to defraud the plaintiff by intentionally concealing or suppressing the fact; (4) the plaintiff was unaware of the fact and would not have acted as he or she did if he or she had known of the concealed or suppressed fact; and (5) plaintiff sustained damage as a result of the concealment or suppression of the fact." *Hambrick v. Healthcare Partners Med. Grp., Inc.*, 189 Cal. Rptr. 3d 31, 60 (Ct. App. 2015).

The players can establish each of these elements without relying on the CBAs. The SAC alleges that "[t]he NFL knew, or should have known, that its provision and administration of Medications . . . created a substantial risk

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[players' union] regarding diagnosis, medical care and/or treatment of any player." But the plaintiffs assert claims arising between 1969 and 2012, and the 2011 CBA provision would apply to only a sliver of those claims. Moreover, if the NFL undertook to provide direct medical care and treatment to players, as the plaintiffs allege, then the disclaimer—which only states that nothing *in the CBA* should be interpreted as giving rise to duties regarding medical care—would not relieve the NFL of its duty not to misrepresent the effects of the drugs it was giving to players. *Cf. Cramer*, 255 F.3d at 697 ("Because a CBA cannot validly sanction illegal action, we hold the terms of the CBA were irrelevant to plaintiffs' claim.").

of causing addictions and related physical and mental health problems." It also alleges that the NFL intentionally withheld this information from players with the intent to deceive them.

The NFL has not identified any CBA provisions that must be interpreted in order to resolve the players' fraud claims. As with the negligent misrepresentation claim, the NFL argues that assessing whether the NFL had a duty to make disclosures, and whether the players reasonably relied on the NFL's representations, would require interpreting CBA provisions requiring team doctors to make certain disclosures. But as explained above, because the players' claims are about the NFL's conduct, resolving these claims does not require interpreting CBA provisions regarding *team* doctors' disclosure obligations.

E

The players' loss of consortium claim, as well as their requests for declaratory judgment and medical monitoring, are derivative of their other claims. Because we hold that their claims are not preempted, we reverse the district court's dismissal of the derivative claims and remand.

F

The NFL argues that we should affirm the dismissal of all claims on the ground that the players failed to exhaust the grievance procedures required by the CBAs. For more than forty years, each CBA has included provisions that require players to follow certain dispute-resolution procedures for "[a]ny dispute . . . involving the interpretation or application of, or compliance with, provisions of [the CBA]."

However, the players are not arguing that the NFL failed to comply with the terms of the CBA. Nor do their claims require the interpretation or application of the CBAs, for the reasons already described. Therefore, we reject the NFL's argument that we should affirm the dismissal of the plaintiffs' claims on this ground.

III

Preemption under § 301 "extends only as far as necessary to protect the role of labor arbitration in resolving CBA disputes." *Schurke*, 2018 WL 3636431, at *1. As pled, the players' claims do not constitute a dispute over the rights created by, or the meaning of, the CBAs. Their claim is that when the NFL provided players with prescription drugs, it engaged in conduct that was completely outside the scope of the CBAs. The meaning of CBA terms governing team doctors' disclosure obligations, the qualifications of team medical personnel, and players' rights to obtain second opinions or examine their medical records is simply irrelevant to the question of whether the NFL's conduct violated federal laws regarding the distribution of controlled substances and state law regarding hiring, retention, misrepresentation, and fraud. Therefore, no interpretation of the terms of the CBAs is necessary, and there is no danger that a court will impermissibly invade the province of the labor arbitrator. *See id.* at *8.

We express no opinion about the ultimate merits of the players' claims. They may be susceptible either to a motion for a more definite statement under Rule 12(e) or a motion to dismiss for failure to state a claim under Rule 12(b)(6), and they may not survive summary judgment under Rule 56. But the fact that the claims may have been inadequately pled is not a reason for finding them preempted. The complaint alleges claims that do not arise from the CBAs and do not

require their interpretation. Therefore, they are not preempted by § 301.

Each party shall bear its own costs.

REVERSED and REMANDED.

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

RICHARD DENT, an individual, JEREMY NEWBERRY, an individual, ROY GREEN, an individual, J.D. HILL, an individual, KEITH VAN HORNE, an individual, RON STONE, an individual, RON PRITCHARD, an individual, JAMES MCMAHON, an individual, and MARCELLUS WILEY, an individual, on behalf of themselves and all others similarly situated;

Plaintiffs,

v.	) **CASE NO. C-14-2324 WHA/JCS**
	)
NATIONAL FOOTBALL LEAGUE, a New York unincorporated association;	) **THIRD AMENDED CLASS ACTION**) **COMPLAINT**) **DEMAND FOR JURY TRIAL**
Defendant.	) **CLASS ACTION**
	)

COMES NOW the named Plaintiffs, by and through undersigned counsel and on behalf of themselves and a class of retired National Football League ("NFL" or the "League") players, who file this Third Amended Class Action Complaint against the NFL and allege as follows:

INTRODUCTION

1. Plaintiffs seek redress for injuries resulting from a return to play business plan ("Business Plan") implemented and maintained by the NFL from at least the 1960s through 2014. The allegations herein are supported by hundreds, if not thousands, of documents that have been produced, and by testimony provided from Bud Carpenter (Buffalo Bills' trainer); Dr. Lawrence Brown (NFL medical advisor on prescription drugs since the early 1990s); Dr. David Chao (Los Angeles Chargers' doctor); Dr. Gerald Kuykendall (Miami Dolphins' doctor); Dr. John Marzo (Buffalo Bills' doctor); Dr. Matthew Matava (Los Angeles Rams' doctor); Dr. David Olson (Minnesota Vikings' doctor); Dr. Elliott Pellman (New York Jets' doctor and NFL medical advisor); Dr. Arthur Rettig (Indianapolis Colts' doctor); Dr. Andrew Tucker (Baltimore Ravens' doctor); and Dr. Anthony Yates (Pittsburgh Steelers' doctor), in a related case: *Etopia Evans, et al. v Arizona Cardinals Football Club, LLC, et al.* ("*Evans*").

2. The NFL's Business Plan has prioritized profit over safety with more games, less rest (*e.g.*, Thursday night football), and smaller rosters that save payroll expenses. And it achieves its ends because everyone involved in the League, save the players, has a financial interest in returning players to the game as soon as possible. From doctors to coaches to general managers

to League officials, their job and salary depend on this simple fact. The return to play plan was based on four cornerstone concepts: profit, media, non-guaranteed contracts, and drugs. As professional football took off, these bedrock concepts would become the driving force behind every business decision made by the League.

3. The NFL also manipulated the media to increase revenue and reinforce the return to play practice or policy. In 1965, the NFL created NFL Films to market video of its games, coaches, and players. NFL Films highlighted the violence of the game and the "toughness" of its players. Dramatic collisions between players were highlighted in slow motion. Players who returned to the game with severe injuries were lauded as courageous heroes. These same themes were repeated by the broadcast networks. American folklore regarding professional football players was indelibly established – the players were super human warriors who played through pain for the integrity of the game they loved. The return to play Business Plan became an accepted fact of doing business by the NFL as profits soared.

4. In its thirst for constantly-growing revenue, the NFL expanded from 24 to 32 Clubs, added two more regular season games (and are looking to add two more), expanded the number of Clubs participating in post-season play, and scheduled more games during the week (particularly on Thursday nights), leaving players with less recovery time and greater chances for new injuries or worsening of existing injuries.

5. In a survey by the Washington Post, nearly nine out of 10 former players reported playing while hurt. Fifty-six percent said they did this "frequently." An overwhelming number – 68 percent – said they did not feel like they had a choice as to whether to play injured.

6. Those players are right – the Defendant gave them no choice. From the beginnings of professional football to the present day, the NFL has created a coercive economic environment

in which all players have non-guaranteed contracts. The current standard player contract states that the player's salary is game to game and a player's contract can be terminated for lack of skill at any time (referred to as being "cut"). Players are constantly reminded by general managers, coaches and the media of the competitive nature of the game and the importance of playing. If a player is injured, coaches advise him to return to play as soon as possible to prevent a replacement from taking his spot on a Club. Rookie players are immediately told of the decades' long adage promulgated by the NFL – "You can't make the Club in the tub." The NFL exerts enormous economic pressure on the players to return to play as soon as possible and play through the pain. This financial reality is reinforced by the NFL-created image of the professional football player as heroic warrior. *See* "Promoting and Protecting the Health of NFL Players: Legal and Ethical Analysis and Recommendations" by Deubert, Cohen and Lynch (November 1, 1016) (hereinafter the "Harvard Report") at p. 72 – 73. "The pressures to perform and remain on the field at all costs can be extraordinary.… Indeed players feel pressure to play through injuries not only from their coaches but also from teammates, opponents, fans, media and others." The perspectives of all the groups mentioned are influenced and shaped by the NFL.

7. From the outset, the means by which the NFL facilitated the return to play Business Plan was the widespread availability of the Medications, as defined *infra*. The NFL has distributed these controlled substances and prescription medications with little to no regard for the law or the players' health. In 1994, former Raiders doctor Rob Huizenga noted in his book *"You're Okay, It's Just a Bruise": A Doctor's Sideline Secrets About Pro Football's Most Outrageous Team* that Raiders owner Al Davis routinely pressured players and doctors to do anything to get a player back on the field, regardless of the risks. And NFL doctors and trainers know that, if players are given adequate rest and do not return to the game, the doctor or trainer will be replaced. While that once

may not have caused any concern, as the position of Club doctor and trainer have become increasingly lucrative, the pressures on the medical personnel to return players to the field have only increased. The NFL has established a business culture in which everyone's financial interest depends on supplying Medications to keep players in the game.

8. When the DEA threatened the Business Plan in 2010, the reaction was resistance. A typical response is found in an e-mail dated November 3, 2010. Paul Sparling, the Bengals head trainer, writes to Dean Kleinschmidt, the Lions head trainer: "Until the VCML is actually in effect, we will continue to do as we have done for the past 42 years [*i.e.*, travel and distribute controlled substances in violation of federal law]…. I sure would love to know who blew up the system that worked all these years. It reminds me of when Charlie (from NFL security) told Marv, George Anderson, Ralph Berlin, etc., that having a bottle with more than one type of medications was co-mingling!" Clubs travelled with the Medications in violation of federal law until at least 2015, after the filing of this lawsuit.

9. The Business Plan is best exemplified by a single-page document produced in *Evans* that was prepared in 2014 by Dr. Thomas McClellan, an associate of Dr. Lawrence Brown, titled "The Role of League-Wide Incentives in Promoting the Opioid Use Problem: The Need for League-Wide Collaboration to Solve the Problem" (the "Opioid Use Problem").

10. In the Opioid Use Problem, Dr. McClellan identifies three issues, each of which have several sub-points. The first is "Pain and the Ability to Play Competitive Football," about which Dr. McClellan makes four points: (1) "Pain is omnipresent among NFL players – it is an almost unavoidable consequence of playing the game at the professional level;" (2) "NFL players who are in pain are not as able or as likely to play the game at their most competitive level;" (3) "NFL players who do not play at their competitive best could face loss of status and income;" and

(4) "NFL teams whose players do not compete at their best can face loss of status and revenue." His takeaway point: "It is in the players', the teams', and the league's reputational and financial interests to have the most competitive level of play and thus to find ways to overcome any impediment to competitive play – perhaps especially pain."

11. The next issue Dr. McClellan addresses is "Pain Relieving Medications and Competitive Football," about which he makes two points: (1) "Opioids and other non-opioid pain medications are demonstrably effective in the short term for relieving most forms of skeletal and muscular pain so often experienced by NFL players;" and (2) "For these reasons appropriate (properly prescribed and monitored) as well as inappropriate opioid and non-opioid pain medication use are both more common among NFL players." His takeaway point on this issue: "It is in the players', the teams', and the league's reputational and financial interests to use analgesic medications for pain relief. These incentives and the nature of the sport combine to make opioid and other pain medication usage much more prevalent in the NFL than in virtually any other industry, population or endeavor. This really means that there is shared responsibility and joint culpability for the problem."

12. Dr. McClellan's final issue is "Short and Long-Term Risks of Pain Medication Use in Professional Football," about which he makes three points: (1) "Players in pain who would otherwise not play or play at the same level of competitiveness may be induced by a pain medication and their personal financial/reputational incentives to play under conditions that could exacerbate their injuries and hinder their recovery;" (2) "Players who take opioid or other abuse-liable medications – especially for protracted periods or at high dosages – will be at longer-term risk for developing abuse or addiction;" and (3) "Because opioids relieve pain that might otherwise prevent or diminish normal willingness or ability to play football – they can be considered

'performance enhancing drugs' although not in the same sense as amphetamines or stimulants." His takeaway point on this issue: "Because of the shared responsibility for the nature of the problem; because of the multiple incentives for using pain medications; and because the short and long term risks of pain medication use and abuse have already been demonstrated – it is in the shared interests of the players, the teams and the league to take combined action to find practical solutions to the problem – these solutions must address some of the powerful incentives for pain medication use that are endemic to the sport."

13. Plaintiffs do not know whether the League has sought "to find practical solutions to the problem" since Dr. McClellan issued the foregoing document. But they do know that, from at least 1969 through 2008 when they played in the League, controlled substances and medications requiring prescriptions were illegally provided to them and thousands of other players in quantities and at frequencies that shock the conscience. And based on documents and testimony provided in *Evans*, those illegal practices continued until at least 2014.

14. Over the course of those five decades, medications have changed. Amphetamines, which at one time were left out in bowls in locker rooms, are not used as frequently now. Toradol is a more recent drug of choice in the League. But while the specific medications have changed, the NFL has dealt the following types of medications to its players consistently since 1969:

- **Opioids**: narcotics whose analgesic properties operate by binding to opioid receptors found primarily in the central nervous system and gastrointestinal tract. Opioids act to block and dull pain. The side effects of opioids include sedation and a sense of euphoria. Opioids are commonly known to be highly addictive and are indicated for short-term use by patients with no family or personal history of drug abuse and for those without significant respiratory issues.

- **Non-Steroidal Anti-Inflammatory Medications ("NSAIDs")**: a class of medications that have analgesic and anti-inflammatory effects to mitigate pain, the most common of which are Aspirin and Ibuprofen. All NSAIDs have blood thinning properties and have been linked to long-term kidney damage and other issues. Physicians deem Toradol particularly dangerous and its use is therefore generally limited to short-term administrations in

hospitals for surgical patients.

- **Local Anesthetics (such as Lidocaine)**: are generally indicated as a local anesthetic for minor surgery and are generally injected to numb the surrounding area. Lidocaine has been known to result in cardiac issues for certain patients and it is indicated for surgical use in patients without heart problems.

15. The foregoing medications ("Medications") were often administered without a prescription or side effects warnings and with little regard for a player's medical history, potentially-fatal interactions with other medications, or the actual health and recovery from injury of the player. Administering these Medications in this cavalier manner constitutes a fundamental misuse of carefully-controlled Medications and a clear danger to the players both at the time of administration and later-in-life.

16. The NFL was required to, or voluntarily undertook the duty to, comply with federal and state laws regulating the manner in which these Medications were administered and distributed. It failed to do so, consistently and repeatedly, from the 1970s through at least 2014 and that failure directly and proximately caused the injuries for which Plaintiffs seek damages.

PARTIES

I. THE PLAINTIFFS AND CLASS REPRESENTATIVES WERE VICTIMS OF DEFENDANT'S RETURN TO PLAY PLAN DURING THEIR NFL CAREERS.

17. The Class Representatives each played in the League between 1969 and 2008. Despite playing for different teams and at different times, their stories are remarkably similar. They suffer from two discrete sets of injuries directly caused by the League's omissions and concealment: (1) internal organ injuries, and (2) muscular/skeletal injuries caused or exacerbated by the Business Plan.

18. Plaintiff Richard Dent is a representative of the putative class as defined herein. As of the commencement of this action, he is a resident and citizen of Illinois. Mr. Dent played in a

total of 203 games as a defensive end for the Chicago Bears from 1983 – 1993 and again in 1995; the San Francisco 49ers in 1994; the Indianapolis Colts in 1996; and the Philadelphia Eagles in 1997. He was a four-time Pro Bowl selection; five-time All-Pro selection; two-time Super Bowl champion; and was inducted into the Pro Football Hall of Fame in 2011. He played two games in the state of New York and five games in the state of California, where he experienced the provision of Medications described herein.

19. While playing in the NFL, Mr. Dent received hundreds, if not thousands, of injections from doctors and pills from trainers, including but not limited to NSAIDs and Percodan. Mr. Dent recalls a daily ritual of going to breakfast with the team, then receiving whatever Medications necessary to get him on the field, taking them in time to be able to practice, and then taking downers at night to sleep.

20. Mr. Dent further recalls that, generally while playing with the Chicago Bears, he received Tylenol with Codeine; Percodan; Percocet; and Valium, which he took upon receipt, and Novacaine injections. He further states that he also received Valium from the San Francisco 49ers, the Indianapolis Colts, and the Philadelphia Eagles, which he took upon receipt.

21. Medical records provided by his NFL teams reveal that:

- In 1983, while with the Chicago Bears, he received pain-numbing and anti-inflammatory medications from Fred Caito and team physicians Dr. Clarence Fossier and Dr. John A. Brna, which he took upon receipt;
- In 1988, while with the Chicago Bears, he received pain-numbing and anti-inflammatory medications from Fred Caito and team physicians Dr. Clarence Fossier and Dr. John A. Brna, which he took upon receipt;
- In 1991, while with the Chicago Bears, he received pain-numbing and anti-inflammatory medications from Fred Caito and team physicians Dr. Clarence Fossier and Dr. John A. Brna, which he took upon receipt;
- In 1993, while with the Chicago Bears, Mr. Dent received 29 50 mg tablets of Pen VK, which he took as directed.

- In 1994, during his employment with the San Francisco 49ers, Mr. Dent was regularly provided with Feldene, Prednisone, Motrin, Vicodin, Celestone Soulspan with soluble Decadron, Indocsin, and Azulfidine, which he took upon receipt.

- In 1995, during his employment with the Chicago Bears, Mr. Dent was regularly provided with Depo-Medrol, Lidocaine, aqueous Decadron, Feldene, Azulfidine, and Prednisone, which he took upon receipt.

- In 1996, during his employment with the Indianapolis Colts, Mr. Dent was regularly provided with pain-numbing and anti-inflammatory medications by team doctors and trainers, which he took upon receipt.

- In 1997, during his employment with the Philadelphia Eagles, Mr. Dent was regularly provided with pain-numbing and anti-inflammatory medications by team doctors and trainers, which he took upon receipt.

22. Mr. Dent does not recall the dosage of the Medications he received and, more often than not, the person providing the Medication to Mr. Dent did not advise him of the dosage and, to the extent the Medication was provided in a container (regardless of what type of container), the container did not identify the dosage. Mr. Dent states the he took more Medications than his memory or his medical records indicate. He never received the statutorily required warnings about side effects of any of the Medications.

23. Mr. Dent also recalls his first injury during his NFL career. In his rookie year (1983), Mr. Dent played in the first preseason game. In the first practice after that game four players fell on him. His legs literally did the splits and he tore his hamstring and tendons/ligaments in his ankle. The pain was so bad it was difficult for Mr. Dent to sit on the toilet or even walk. Despite being put on several anti-inflammatory drugs and pain killers, he questioned being put back on the field. He ended up playing in the last preseason game, doped up to the point that he could hardly remember playing. This is where it started and went on from there; a pill for this or a shot for that. It was not until game 14 or 15 of the regular season that the pain truly began to subside.

24. In addition, medical records provided by his NFL teams reveal that Mr. Dent suffered many injuries during his NFL career:

- In 1983 he tore his right hamstring and left ankle ligaments;
- In 1988 he fractured his left fibula;
- In 1990 he suffered turf toe;
- In 1991 he fractured his collarbone;
- In 1994 he strained his left rear deltoid; strained his rhomboid in his right shoulder; suffered tendinitis in both his left and right knees; suffered a contusion on his left patella; suffered a concussion; suffered an avulsion fracture of the fibular head on his right knee along with ACL and MCL tears; suffered a talar break; and suffered bilateral boutonniere deformities on the fifth digits of his hand.
- In 1995 he suffered right quadriceps atrophy with moderate joint effusion.

25. Mr. Dent believes that the foregoing injuries were caused, aggravated, extended, worsened, prolonged, exacerbated, intensified, perpetuated, protracted, or made permanent by the wrongful administration of Medications to him. Many of these injuries were known only generally to Mr. Dent at the time of their occurrence; the specific nature or details of the injuries were generally withheld from Mr. Dent. Moreover, Mr. Dent was never contemporaneously informed or knowledgeable that his injuries were caused, aggravated, extended, worsened, prolonged, exacerbated, intensified, perpetuated, protracted, or made permanent by the wrongful administration of Medications. Mr. Dent also states that he had more injuries than his memory or his medical records would indicate.

26. At this time, Mr. Dent seeks redress for the muscular/skeletal injuries and internal organ injuries discussed above and below.

27. Mr. Dent trusted and relied on the NFL's doctors and trainers and would not have taken the Medications in the manner and amount in which he did had the Defendant provided him with the information it was legally obligated to provide as discussed herein.

28. Plaintiff Jeremy Newberry is a representative of the putative class as defined herein. As of the commencement of this action, he is a resident and citizen of California. Mr. Newberry played 120 games at center for the San Francisco 49ers from 1998 to 2006, the Oakland Raiders in 2007, and the San Diego Chargers in 2008. He was a two-time Pro Bowler; twice named to the All Pro team; and twice received the Ed Block Courage Award, an annual award voted on by players for colleagues who are models of inspiration, sportsmanship and courage. He played three games in the state of New York and 51 games in the state of California, where he experienced the provision of Medications described herein.

29. While playing in the NFL, Mr. Newberry received hundreds, if not thousands, of injections from doctors and pills from trainers, including but not limited to NSAIDs, Vicodin, Toradol, Ambien, Indocin, Celebrex, and Prednisone. Mr. Newberry received hundreds of Toradol injections over the course of his career and, for many games, would receive as many as five or six injections of other Medications during the course of a game. He also would receive Vicodin before, during and after games to numb pain and often during a game would simply ask a trainer for Medications, which would be provided without record as to what was being pushed on him.

30. During the course of his employment with the San Francisco 49ers and the Oakland Raiders, medical records provided by his NFL teams reveal that Mr. Newberry was provided with the following Medications by the following doctors:

- **Dr. Klint**: Augmentin 500 mg and Tylenol on September 8, 1999; Levaquin 500 mg, Tylenol, and Robitussin on November 19, 1999; Prednisone, liter of lactated ringer's solution, and albuterol on November 21, 1999; Turbinate injections, Ceftin 500 mg, Entex LA on November 5, 2000; Turbinate injection on December 4, 2000;

Toradol 60 mg IM on October 14, 2001, October 28, 2001, (November 4, 2001 – December 30, 2001, January 6, 2002 – November 17, 2002), November 25, 2002, December 1, 2002, December 8, 2002, Keflex 500 mg on December 11, 2002, Zithromax 500 and 250 mg on October 24, 2001, Augmentine 500 mg on December 24, 2002, 5-day Z-Pak on December 26, 2002; Toradol 60 mg IM on January 5, 2003;

- **Dr. Dillingham**: 1.0 cc of Celestone Soluspan and 1.0 cc Decadron on September 26, 1999; Xylocaine and soluble Decadron injections on October 13, 2001; Dexadron injection on October 13, 2001;.5 cc of .5% Marcaine on November 26, 2002, 1.5 cc .5% Marcaine and 1.5 cc 2% Xylocaine injection on December 15, 2002, 2 cc of .5% Marcaine with 2% Xylocaine injection on December 30, 2002; Prednisone on September 15, 2003, Steroid and local anesthetic injection on September 24, 2003; Prednisone on November 20, 2003; Dr. Bryan: Avapro 150 mg on May 8, 2004, Norvasc 5 mg on July 29, 2004; Vicodin on August 9, 2004, 5 day Prednisone Dosepak on November 27, 2004, Ibuprofen 800 mg on October 7, 2004, Prednisone on November 8, 2004; Keflex on June 15, 2005; Dr. Lambert: Synvisc injection on July 18, 2005; Steroid and Bupivacaine aspiration;

- **Dr. Millard**: Interdigital nerve block on November 26, 2002; 2 cc of 1% Xylocaine with .5% Marcaine injections on January 5, 2003; Prednisone 40 mg and Bextra on November 11, 2004; Dr. Oloff: ¼ cc of Dexamethasone and ¼ cc of 1% lidocaine plain; .5 cc of .5 % Marcaine with 1 cc of 2 % Xylocaine; Avapro and Norvasc on July 29, 2004;

- **Dr. Wall**: Non-steroidal anti-inflammatory injection on June 3, 2003; 1.5 cc of Kenalog and 2 cc of 1.0 percent Lidocaine; Kenalog and Lidocaine injection on August 6, 2004; Hyalgan injection on September 13, 2004;

- **Dr. Bryan**: Lomotil and Tylenol on June 4, 2003; Toradol 60 mg injection on September 4, 2003; Valtrex 2 gm and Denavir cream on December 10, 2003; Lotrel on September 6, 2005; Lotrel 5/20 mg, Robitussin AC and Z-Pak 500 mg on November 3, 2005; Avapro, Lotrel 10/20 mg, and Voltaren on November 30, 2005;

- **Stanford University Hospital and Clinics Diagnostic Radiology**: .5 ml of lidocaine, 2 mg Dexamethasone, 40 mg Triamcinolone, and 5 ml of Bupivacaine .25% were injected on August 6, 2004; Long acting steroid injection on August 6, 2004;

- **Dr. Donahue**: Keflex 500 mg on June 2, 2005;

- **Dr. Lambert**: Synvisc 2 cc injection on July 11, 2005, July 18, 2005, Lotrel 5/20 mg on July 29, 2005; Celebrex 200mg, Avapro, beta blocker for HTN on August 4, 2006; Sulfasalazine, Celebrex on August 4, 2006;

- **Dr. Oloff**: Dexamethasone on August 22, 2001; Dexamethason and Lidocaine injection on April 14, 2005; ¼ cc Dexamethasone and 1/44 cc of .5% Marcaine plain injection on September 3, 2005;

- **Dr. Phelan**: Zofran on December 1, 2005; and

- **Dr. King**: Duricef 500 mg on August 5, 2006; Cortisone shots in September 2007; Duricef on August 5, 2007; and Lebetol 10 mg IV x 2, Aspirin 325 mg.

31. Mr. Newberry further states that throughout the course of his career as a professional football player, he was provided with other unspecified Medications, including but not limited to non-steroidal anti-inflammatories, pain killers, injections, and muscle relaxers, which lack detailed documentation. Other than stated above, he does not recall the dosage of the Medications he received and, more often than not, the person providing the Medication to Mr. Newberry did not advise him of the dosage and, to the extent the Medication was provided in a container (regardless of what type of container), the container did not identify the dosage. He never received the statutorily required warnings about side effects of any of the Medications.

32. Mr. Newberry recalls that early in the 2004 season he hurt his left ankle and the team doctors told him it was a sprain. He played most of the season anyway, with the doctors giving him a significant amount of painkillers. After the season, he was told that he had completely torn the ligament in the ankle and he required surgery.

33. Mr. Newberry also recalls that he had a total of nine surgeries on his knees, five on his left and four on the right. Most of the surgeries were after the season, some during. To play, he received large amounts of Toradol, Vicodin and Percocet. In the 2005 and 2006 seasons, he remembers that his legs would stop working and he would fall over as if he had been shot. He would simply be given more painkillers.

34. Medical records provided by his NFL teams reveal that Mr. Newberry suffered many injuries during his NFL career as detailed in documents already provided by Mr. Newberry

at NEWBERRY_CONFID_000001-002668 and NEWBERRY_000001-000042. Mr. Newberry believes that the injuries identified in the foregoing documents were aggravated, extended, worsened, prolonged, exacerbated, intensified, perpetuated, protracted, or made permanent by the wrongful administration of Medications to him. Many of these injuries were known only generally to Mr. Newberry at the time of their occurrence; the specific nature or details of the injuries were generally withheld from Mr. Newberry. Moreover, Mr. Newberry was never contemporaneously informed or knowledgeable that his injuries were caused, aggravated, extended, worsened, prolonged, exacerbated, intensified, perpetuated, protracted, or made permanent by the wrongful administration of Medications. Mr. Newberry also states that he had more injuries than his memory or his medical records would indicate.

35. At this time, Mr. Newberry seeks redress for the muscular/skeletal injuries and internal organ injuries discussed above and below.

36. Mr. Newberry trusted and relied on the NFL's doctors and trainers and would not have taken the Medications in the manner and amount in which he did had the League provided him with the information it was legally obligated to provide as discussed herein.

37. Plaintiff Roy Green is a representative of the putative class as defined herein. As of the commencement of this action, he is a resident and citizen of Arizona. Mr. Green played in a total of 190 games as a wide receiver for the St. Louis/Phoenix Cardinals from 1979 to 1990 and the Philadelphia Eagles from 1991 to 1992 during which time he caught 559 passes for 8,965 yards and 66 touchdowns and was a two-time Pro Bowler and twice named to the All-Pro team. He played 11 games in the state of New York and seven games in the state of California, where he experienced the provision of Medications described herein.

38. While playing in the NFL, Mr. Green received hundreds, if not thousands, of injections from doctors and pills from trainers, including but not limited to NSAIDs, Indocin, Naprosyn, Percocet, Vicodin, and Butisol.

39. Medical records provided by his NFL teams reveal that:

- In 1979 during his employment with the St. Louis Cardinals, Mr. Green was given an unspecified amount of Percodan by Dr. James Ellsasser on July 20th; Mr. Green was also given an unspecified amount of Valium and Indocin by Dr. James Ellsasser on July 20th.

- In 1980 during his employment with the St. Louis Cardinals, Mr. Green was given Percodan #24 on December 15th by Dr. James Ellsasser.

- In 1982 during his employment with the St. Louis Cardinals, Mr. Green was injected with 1 cc of both Xylocaine and Aristocort on November 29th by Dr. Jordan Ginsburg; Mr. Green was also given a 10 day course of Butazolidin on December 13th by Dr. Jordan Ginsburg.

- In 1984 during his employment with the St. Louis Cardinals, Mr. Green was injected with 1cc of Xylocaine and an unspecified amount of Aristocort on August 18th; Mr. Green was also injected with an unspecified amount Xylocaine on September 5th by Dr. Jordan Ginsburg; Mr. Green was also injected with an unspecified amount Marcaine on September 5th by Dr. Jordan Ginsburg.

- In 1985 during his employment with the St. Louis Cardinals, Mr. Green was injected with 10 cc of 0.5% Marcaine on November 28th and December 8th; Mr. Green was also injected with 8 cc of 0.5% Marcaine on December 21st, and an unspecified amount on November 4th, with all injections performed by Dr. Jordan Ginsburg.

- In 1986 during his employment with the St. Louis Cardinals, Mr. Green was injected with 1 cc of both Xylocaine and Aristocort on September 10th by Dr. Jordan Ginsburg; Mr. Green was also given an unspecified amount of Indocin on March 21st by Dr. Jordan Ginsburg; Mr. Green was also given an unspecified amount of Naprosyn on April 30th.

- In 1991 during his employment with the Philadelphia Eagles, Mr. Green was given Naprosyn on August 18th, October 3rd and October 8th; Mr. Green was also administered a combination of Emperin and Codeine on October 13th and an unspecified date in December; Mr. Green was also given an IV of Dextrose Decadron on an unspecified date.

- In 1992 during his employment with the Philadelphia Eagles, Mr. Green was on a course of 4 Naprosyn per day.

40. Mr. Green further states that throughout the course of his career as a professional football player, he was provided with other unspecified Medications including but not limited to non-steroidal anti-inflammatories, pain killers, injections, and muscle relaxers, including but not limited to Indocin, Naprosin, Percocet, Valium, and pain-numbing shots, which lack detailed documentation. He does not recall the dosage of the Medications he received and, more often than not, the person providing the Medication to Mr. Green did not advise him of the dosage and, to the extent the Medication was provided in a container (regardless of what type of container), the container did not identify the dosage. Mr. Green states the he took more Medications than his memory or his medical records indicate. He never received the statutorily required warnings about side effects of any of the Medications.

41. Mr. Green developed painful calcium build-ups on his Achilles tendons. Rather than treat the pain through rest or surgery, doctors and trainers gave him anti-inflammatories and he skipped practices to be able to play but ultimately the pain got so bad that he demanded to have surgery. The Cardinals' General Manager at the time, Hall of Famer Larry Wilson, pushed back but grudgingly told Green "it was his decision."

42. Medical records provide by his NFL teams reveal that Mr. Green suffered the following injuries during his NFL career:

- In 1979, he suffered a right gluteal hip sprain; a left quadriceps contusion; a left shoulder contusion; a sprain on his left big toe, a strain of his left quadriceps, neck stiffness and bilateral hamstring soreness;

- In 1980, he suffered an upper back muscle strain; a left knee prepatella burst contusion; a left hip flexor strain; a left hand contusion; a right knee contusion; a right gluteal hamstring strain; neck spasms; a left ankle sprain, a right hand contusion, and a left MCL sprain;

- In 1981, he fractured his left index finger a right shoulder AC joint sprain;

- In 1982, he suffered left hamstring tightness; neck stiffness; right knee tendonitis; a left groin strain; a left shoulder contusion; bilateral groin soreness; right plantaris fasciitis; and a left leg contusion;

- In 1983, he suffered right eye irritation; right knee contusion; a neck strain; a left ankle sprain; right knee patellar tendonitis; a right foot strain; left ulnar nerve contusion, and a right hamstring strain;

- In 1984, he suffered left hamstring soreness; left ankle inflammation; left ankle sprain; left thigh contusion; left groin sprain; left Achilles tendon inflammation; right hip contusion and a right neck/shoulder contusion; a left hand contusion; a left knee contusion;

- In 1985, he suffered chronic avulsion fracture and calcification of hemorrhage in his left deltoid ligament; a right big toe sprain; a left shoulder contusion; a left groin sprain; a concussion; and a left fibula contusion;

- In 1986, he suffered left Achilles tendonitis; a left quadriceps strain; left posterior ankle soreness; right Achilles tendonitis; a right shoulder AC sprain; a right arch sprain; a left ankle sprain; left heel soreness; left side lower back contusion; bilateral hamstring soreness; and a right shoulder AC contusion;

- In 1987, he suffered right quadriceps strain; left Achilles strain; right triceps contusion; left side cervical nerve pinch; left Achilles calcium inflammation; left and right hamstring strains; left quadriceps contusion; right knee patella tendonitis; right calf contusion; left gluteal contusion; and a left groin strain;

- In 1988, he suffered left heel cortical hyperostosis with thin bone spur; a left forearm contusion; bilateral hamstring soreness; a left Achilles soreness; low back-gluteal contusion; a right shoulder strain; a left thumb MP joint sprain; left ribs contusion; a right hip flexor strain; a right knee contusion; a left thigh contusion; and left side abdominal strain;

- In 1989, he suffered a left heel contusion; right knee patellar tendonitis; right shoulder grade 1 AC sprain; left posterior ribs/back contusion; left clavicle fracture; bilateral hip flexor soreness; a right wrist sprain; and a right ankle sprain;

- In 1990, he suffered a right hip flexor strain; right and left heel bursitis; left insertional Achilles tendonitis; a concussion; left ankle sprain; and right shoulder contusion;

- In 1991, he suffered a left Achilles injury and hamstring soreness; a left thumb ulnar collateral ligament sprain; a left ankle lateral sprain; and chronic left insertional Achilles tendinitis;

- In 1992, he suffered a right medial hamstring strain; a possible fracture of his left elbow; and left heel contusion;

- In 1993, he suffered from injuries to his left heel, right calf, right hamstring, left elbow, right groin and right hip and also suffered chronic left inertional Achilles tendonitis.

43. Mr. Green believes that the foregoing injuries were aggravated, extended, worsened, prolonged, exacerbated, intensified, perpetuated, protracted, or made permanent by the wrongful administration of Medications to him. Many of these injuries were known only generally to Mr. Green at the time of their occurrence; the specific nature or details of the injuries were generally withheld from Mr. Green. Moreover, Mr. Green was never contemporaneously informed or knowledgeable that his injuries were caused, aggravated, extended, worsened, prolonged, exacerbated, intensified, perpetuated, protracted, or made permanent by the wrongful administration of Medications. Mr. Green also states that he had more injuries than his memory or his medical records would indicate.

44. At this time, Mr. Green seeks redress for the muscular/skeletal injuries and internal organ injuries discussed above and below.

45. Mr. Green trusted and relied on the NFL's doctors and trainers and would not have taken the Medications in the manner and amount in which he did had the Defendant provided him with the information it was legally obligated to provide as discussed herein.

46. Plaintiff J.D. Hill is a representative member of the putative class. As of the commencement of this action, he is a resident and citizen of Arizona. Mr. Hill played in a total of 73 games as a wide receiver for the Buffalo Bills from 1971 to 1975 and the Detroit Lions from 1975 to 1978, which released him during the 1979 preseason. He was named to the Pro Bowl team

in 1972. He played 26 games in the state of New York and four games in the state of California, where he experienced the provision of Medications described herein.

47. While playing in the NFL, Mr. Hill received hundreds, if not thousands, of pills from trainers and doctors, including but not limited to NSAIDs, Codeine, Valium, and Librium. Medical records provided by his NFL teams reveal that during his employment with the Buffalo Bills (1971-1975), Dr. K.H. Seagrave, Dr. John P. Kelly, Dr. Joe Godfrey and Dr. Richard Weiss generally provided him with Medications and Dr. Weiss prescribed either Codeine, Librium or Valium. During his employment with the Detroit Lions, Dr. William C. Ford, Dr. Edwin Guise, and Dr. Robert C. Nestor generally provided him with Medications. Mr. Hill was also prescribed Butazolidin on 8/19/77. Dr. Nestor provided Tylenol, Butazolidin and aspirin on 8/31/77 per a document signed by trainer Kent Faub.

48. In 1971, Mr. Hill took Codeine, Librium and Valium. Generally while with the Lions, Mr. Hill received painkillers and anti-inflammatories.

49. In 1976 Mr. Hill took Butazolidin and Aspirin. Generally while with the Bills, Mr. Hill received Librium, Valium, Codeine tablets, anti-inflammatories, and pain-numbing injections in his groin and shoulder.

50. Mr. Hill states the he took more Medications than his memory or his medical records indicate.

51. He never received the statutorily required warnings about side effects of any of the Medications.

52. Medical records provided by his NFL teams reveal that Mr. Hill suffered the following injuries during his NFL career:

- In 1971, he suffered several sprained ankles; a fractured nose; a torn right groin muscle; partially-separated or dislocated shoulders; turf toe; numerous broken and dislocated fingers and received surgery on his left knee;

- In 1973, he suffered a concussion and hyperextended both his elbows and wrists;

- In 1976, he suffered a low back strain; right pentineous and pectineulase strains; sprain to the mid-portion of his adductor region; left adductor strain; valgus stress to his left knee; hyperextended wrists; a partially-torn Achilles tendon, and injuries to his groin;

- In 1977, he suffered a contusion and strain of his right lower latissimus dorsi; a left knee effusion; a lower back strain; a right hamstring strain; and a left hamstring sprain;

- In 1978, he suffered a partial tear of his right Achilles tendon and a first-degree hamstring strain;

- In 1979, he suffered a first-degree hamstring spasm.

53. Mr. Hill believes that the foregoing injuries were caused, aggravated, extended, worsened, prolonged, exacerbated, intensified, perpetuated, protracted, or made permanent by the wrongful administration of Medications to him. Many of the injuries identified above were known only generally to Mr. Hill at the time of their occurrence; the specific nature or details of the injuries were generally withheld from Mr. Hill. Moreover, Mr. Hill was never contemporaneously informed or knowledgeable that his injuries were caused, aggravated, extended, worsened, prolonged, exacerbated, intensified, perpetuated, protracted, or made permanent by the wrongful administration of Medications. Mr. Hill also states that he had more injuries than his memory or his medical records would indicate.

54. At this time, Mr. Hill seeks redress for muscular/skeletal injuries and internal organ injuries discussed above and below.

55. Mr. Hill trusted and relied on the NFL's doctors and trainers and would not have taken the Medications in the manner and amount in which he did had the Defendant provided him

with the information it was legally obligated to provide as discussed herein.

56. Plaintiff Keith Van Horne is a representative member of the putative class. As of the commencement of this action, he is a resident and citizen of Illinois. Mr. Van Horne played in a total of 186 games as an offensive tackle for the Chicago Bears from 1981 to 1993. He was a member of the Bears' teams that won the 1985 Super Bowl and participated in the 1984, 1986 – 88, 1990 and 1991 playoffs. Like Mr. Newberry, Mr. Van Horne was a recipient of the Ed Block Courage Award. He played two games in the state of New York and 13 games in the state of California, where he experienced the provision of Medications described herein.

57. While playing in the NFL, Mr. Van Horne received hundreds of injections from doctors and pills from trainers, including but not limited to Novocain, Halcion, Percodan and NSAIDs such as Voltaren and Naproxen. Mr. Van Horne recalls that while he played for the Bears, the players were given Halcion and other Medications, along with beer, to help sleep at night. Also, bowls of Supac (a high-dose mixture of caffeine and aspirin) sat out in the locker rooms. Many Bears players took Supac with their morning coffee as part of the day's ritual.

58. Medical records provided by his NFL teams reveal that:

- In 1981 during the course of employment with the Chicago Bears, Mr. Van Horne was provided with Butazolidin;
- In 1983 during the course of employment with the Chicago Bears, Mr. Van Horne was injected with both Xylocaine and Aristospan;
- In 1986 during the course of employment with the Chicago Bears, Mr. Van Horne was provided with Naprosyn;
- In 1987 during the course of employment with the Chicago Bears, Mr. Van Horne was injected with both Xylocaine and Aristospan;
- In 1988 during the course of employment with the Chicago Bears, Mr. Van Horne was provided with Duricef and injected with Cortisone;

- In 1989 during the course of employment with the Chicago Bears, Mr. Van Horne was given an Epidural injection;
- In 1990 during the course of employment with the Chicago Bears, Mr. Van Horne was provided with Medrol;
- In 1991 during the course of employment with the Chicago Bears, Mr. Van Horne was injected with both Xylocaine and Aristospan.

59. Throughout the course of his career as a professional football player, Mr. Van Horne was also provided with other unspecified Medications including but not limited to non-steroidal anti-inflammatories, pain killers, injections, and muscle relaxers, including but not limited to Percodan, Voltarin, Prednisone, Halcion, Ambien, and Percocet, which lack detailed documentation. Mr. Van Horne does not recall the dosage of the Medications he received and, more often than not, the person providing the Medication to Mr. Van Horne did not advise him of the dosage and, to the extent the Medication was provided in a container (regardless of what type of container), the container did not identify the dosage. He never received the statutorily required warnings about side effects of any of the Medications.

60. Mr. Van Horne recalls that during a playoff game against the New York Giants on January 13, 1991, he could not lift his arm. Doctors and trainers knew he could not lift his arm so they gave him two Percodan for the first half and two Percodan for the second half to allow him to play. Often, he was not told what he was being given.

61. Medical records provided by the Chicago Bears reveal that Mr. Van Horne suffered multiple sprains and pulls of his ankles, hamstrings, neck and knees; has had both of his shoulders scoped twice; suffered a broken left thumb; had surgery on both Achilles tendons; has pins in his right pinky; tore his left bicep tendon (after he finished playing but due to wear and tear from playing); tore his right bicep tendon; and tore a ligament in his left elbow.

62. Mr. Van Horne believes that the foregoing injuries were aggravated, extended, worsened, prolonged, exacerbated, intensified, perpetuated, protracted, or made permanent by the wrongful administration of Medications to him. Many of these injuries were known only generally to Mr. Van Horne at the time of their occurrence; the specific nature or details of the injuries were generally withheld from Mr. Van Horne. Moreover, Mr. Van Horne was never contemporaneously informed or knowledgeable that his injuries were caused, aggravated, extended, worsened, prolonged, exacerbated, intensified, perpetuated, protracted, or made permanent by the wrongful administration of Medications. Mr. Van Horne also states that he had more injuries than his memory or his medical records would indicate.

63. At this time, Mr. Van Horne seeks redress for the muscular/skeletal injuries and internal organ injuries discussed above and below.

64. Mr. Van Horne trusted and relied on the NFL's doctors and trainers and would not have taken the Medications in the manner and amount in which he did had the Defendant provided him with the information it was legally obligated to provide as discussed herein.

65. Plaintiff Ron Stone is a representative member of the putative class. As of the commencement of this action, he is a resident and citizen of California. Mr. Stone played in 173 games as an offensive lineman for the Dallas Cowboys from 1993 to 1995; the New York Giants from 1996 to 2001; the San Francisco 49ers from 2002 to 2003, and the Oakland Raiders from 2004 to 2005. He was a three-time Pro Bowl selection; two-time All-Pro selection, and two-time Super Bowl champion. He played 23 games in the state of New York and 31 games in the state of California, where he experienced the provision of Medications described herein.

66. While playing in the NFL, Mr. Stone received hundreds of injections from doctors and thousands of pills from trainers, including but not limited to NSAIDs such as Toradol,

Naprosyn and Indocin as well as Ambien, Percocet, and Cortisone.

67. Medical records provided by his NFL teams reveal that:

- **Dr. Warren King:** 2% Lidocaine solution was administered by Dr. Warren D. King on November 8, 2004 while Mr. Stone was employed by the Oakland Raiders:

- **Dr. Barrett L. Bryan:** Unspecified amount of Septra DS was given by Dr. Barrett L. Bryan on November 17, 2003 while Mr. Stone was employed by the San Francisco 49ers. Unspecified amount of Bactrim DS was given by Dr. Barrett L. Bryan on November 18, 2003 while he was employed by the San Francisco 49ers:

- **Dr. Michael F. Dillingham:** Unspecified amount of Indocin was prescribed by Dr. Michael F. Dillingham on October 6, 2003 while Mr. Stone was employed by the San Francisco 49ers:

- **Dr. Chris Beaulieu:** Unspecified amount of Lidocaine given by injection at some point prior to September 11, 2003 by Dr. Beaulieu while Mr. Stone worked for the San Francisco 49ers. . Unspecified amount of Decadron injected by Dr. Chris Beaulieu at some point prior to July 24, 2003 as noted by Dr. Michael F. Dillingham in a 49ers Recheck on July 24, 2003 while Mr. Stone was employed by the San Francisco 49ers. . Unspecified injection given by Dr. Chris Beaulieu on June 18, 2003 while Mr. Stone was employed by the San Francisco 49ers:

- **Dr. Lindsay:** Unspecified amount of Indocin started on January 21, 2003 given by Dr. Lindsay and noted by Dr. Michael S. Wall on January 23, 2003 while Mr. Stone was employed with the San Francisco 49ers:

- **Dr. James B. Klint:** 60mg Tordaol injected by Dr. James B. Klint on January 5, 2003 while Mr. Stone was employed by the San Francisco 49ers. . 60mg Toradol injected by Dr. James B. Klint on November 17, 2002 while Mr. Stone was employed by the San Francisco 49ers. . 60mg Toradol injected by Dr. James B. Klint on November 10, 2002 while Mr. Stone was employed by the San Francisco 49ers. . 60mg Toradol injected by Dr. James B. Klint on November 3, 2002 while Mr. Stone was employed by the San Francisco 49ers. . 60mg Toradol injected by Dr. James B. Klint on October 27, 2002 while Mr. Stone was employed by the San Francisco 49ers. . 60mg Toradol injected by Dr. James B. Klint on October 20, 2002 while Mr. Stone was employed by the San Francisco 49ers:

- **Dr. Barrett Bryan:** 60mg Toradol injected by Dr. Barrett Bryan on October 22, 2002 while Mr. Stone was employed by the San Francisco 49ers. 60mg Toradol injected by Dr. Barrett Bryan on September 15, 2002 while Mr. Stone was employed by the San Francisco 49ers;

- **Trainer Lazenby:** Unspecified amount of Indocin given by trainer Lazenby on October 2, 2003 while Mr. Stone was employed by the San Francisco 49ers.

Unspecified amount of Toradol injection given prior to October 7, 2003 as noted in the player treatment log by trainer Tanaka while Mr. Stone was employed by the San Francisco 49ers. Unspecified amount of Indocin given by trainer Lazenby on October 10, 2003 while Mr. Stone was employed by the San Francisco 49ers;

- **Trainer "M":** 8 tablets of 20mg Prednisone given by trainer "M" on July 23, 2002 while Mr. Stone was employed by the San Francisco 49ers. 000777. 28 capsules of 75mg Indocin capsule given by trainer "M" on August 12, 2002 while Mr. Stone was employed by the San Francisco 49ers. 5 tablets of 20mg Prednisone tablet given by trainer "M" on August 21, 2002 while Mr. Stone was employed by the San Francisco 49ers. 28 capsules of 75mg Indocin capsule given by trainer "M" on October 12, 2002 while Mr. Stone was employed by the San Francisco 49ers. 28 capsules of 75mg Indocin given by trainer "M" on October 23, 2002 while Mr. Stone was employed by the San Francisco 49ers. 4 tablets 7.5mg of Vicodin given by trainer "M" on December 22, 2002 while Mr. Stone was employed by the San Francisco 49ers. 28 capsules of 75mg Indocin given by trainer "M" on December 24, 2002 while Mr. Stone was employed by the San Francisco 49ers. . 1 tablet 7.5mg Vicodin given by trainer "M" on January 6, 2003 while Mr. Stone was employed by the San Francisco 49ers. 28 capsules of 75mg Indocin given by trainer "M" on January 23, 2003 while Mr. Stone was employed by the San Francisco 49ers. 28 capsules of 75mg of Indocin given by trainer "M" on May 3, 2003 while Mr. Stone was employed by the San Francisco 49ers. 28 capsules of 75mg of Indocin given by trainer "M" on May 17, 2003 while Mr. Stone was employed by the San Francisco 49ers. 42 capsules of 50mg Indocin X given by trainer "M" on August 17, 2003 while Mr. Stone was employed by the San Francisco 49ers. . 1 capsule 75mg Indocin given by trainer "M" on October 2, 2003 while Mr. Stone was employed by the San Francisco 49ers. . 1 capsule 75mg Indocin given by trainer "M" on October 11, 2003 while Mr. Stone was employed by the San Francisco 49ers. 2 tablets of 7.5/325mg Norco given by trainer "M" on September 14, 2003 while Mr. Stone was employed by the San Francisco 49ers. 1 capsule 75mg Indocin given by trainer "M" on September 27, 2003 while Mr. Stone was employed by the San Francisco 49ers. 1 tablet 7.5/325mg Norco given by trainer "M" on September 28, 2003 while Mr. Stone was employed by the San Francisco 49ers. 1 tablet 7.5/325mg Norco given by trainer "M" on October 12, 2003 while Mr. Stone was employed by the San Francisco 49ers. 2 tablets 7.5/325mg Norco given by trainer "M" on October 19, 2003 while Mr. Stone was employed by the San Francisco 49ers. 1 tablet 7.5/325mg Norco given by trainer "M" on October 26, 2003 while Mr. Stone was employed by the San Francisco 49ers. Norco given by trainer "M" on November 17, 2003 while Mr. Stone was employed by the San Francisco 49ers. 1 tablet 7.5/325mg. Norco given by trainer "M" on November 23, 2003 while Mr. Stone was employed by the San Francisco 49ers. Norco given by trainer "M" on December 14, 2003 while Mr. Stone was employed by the San Francisco 49ers. 1 tablet 7.5/325mg. Norco given by trainer "M" on December 21, 2003 while Mr. Stone was employed by the San Francisco 49ers. Prednisone given by trainer "M" on November 10, 2003 while Mr. Stone was employed by the San Francisco 49ers. 2 tablets of 7.5/325mg Norco given by trainer "M" on December

21, 2003 while Mr. Stone was employed by the San Francisco 49ers. 14 capsules 75mg Indocin SR given by trainer "M" on December 22, 2003 while Mr. Stone was employed by the San Francisco 49ers;

- **Trainer "R":** 1 injection 60mg Toradol given by trainer "R" on October 26, 2003 while Mr. Stone was employed by the San Francisco 49ers;

- **Trainer "BB":** 60mg Toradol injection given by trainer "BB" on September 7, 2003 while Mr. Stone was employed by the San Francisco 49ers. 60mg Toradol injection given by trainer "BB" on September 14, 2003 while Mr. Stone was employed by the San Francisco 49ers. 60mg Toradol injection given by trainer "BB" on October 5, 2003 while Mr. Stone was employed by the San Francisco 49ers. . 60mg Toradol injection given by trainer "BB" on October 12, 2003 while Mr. Stone was employed by the San Francisco 49ers. Toradol given by trainer "BB" on September 21, 2003 while Mr. Stone was employed by the San Francisco 49ers. 2 injections of 30mg Toradol given by trainer "BB" on September 28, 2003 while Mr. Stone was employed by the San Francisco 49ers. 1 injection 60mg Toradol given by trainer "BB" on October 19, 2003 while Mr. Stone was employed by the San Francisco 49ers. 1 injection 60mg Toradol given by trainer "BB" on November 2, 2003 while Mr. Stone was employed by the San Francisco 49ers. 1 injection 60mg Toradol given by trainer "BB" on November 17, 2003 while Mr. Stone was employed by the San Francisco 49ers. 1 injection 60mg Toradol given by trainer "BB" on November 23, 2003 while Mr. Stone was employed by the San Francisco 49ers. 1 injection 60mg Toradol given by trainer "BB" on December 21, 2003 while Mr. Stone was employed by the San Francisco 49ers. 4 tablets Septra DS 800-160 given by trainer "BB" on November 17, 2003 while Mr. Stone was employed by the San Francisco 49ers. 36 tablets Septra DS 800-160 given by trainer "BB" on November 18, 2003. 1 injection of 60mg Toradol given by trainer "BB" on December 14, 2003 while Mr. Stone was employed by the San Francisco 49ers. 4oz. Robitussin A/C given by trainer "BB" on November 28, 2003 while Mr. Stone was employed by the San Francisco 49ers;

- **Dr. Millard:** 1.5cc Decadron injected by Dr. Millard on a date prior to November 20, 2003 as reported by trainer Lazenby on November 20, 2003 in the player treatment history while Mr. Stone was employed by the San Francisco 49ers.

68. Mr. Stone further states that throughout the course of his career as a professional football player, he was provided with other unspecified Medications including but not limited to non-steroidal anti-inflammatories, pain killers, injections, and muscle relaxers, which lack detailed documentation. He does not recall the dosage of the Medications he received and, more often than not, the person providing the Medication to Mr. Stone did not advise him of the dosage and, to the

extent the Medication was provided in a container (regardless of what type of container), the container did not identify the dosage. He never received the statutorily required warnings about side effects of any of the Medications.

69. Mr. Stone received a serious elbow injury while playing with the Dallas Cowboys. Rather than recommend surgery, he was shot with painkillers. In addition, Mr. Stone tore his thumb while playing with the Giants. He was told that, if he were a baseball player he would have been out for the season but because he was a football player, it could wait until the off-season.

70. Stone also suffered from a MCL sprain to his knee while playing with the Raiders. Rather than sit out and rest, he was given shots in the affected area and pain pills, was re-taped, and was sent back out to play. He ultimately developed an MCL tear.

71. Medical records provided by his former teams reveal additional injuries sustained by Mr. Stone during his NFL career; those documents have already been provided by Mr. Stone at STONE_CONFID_000009-25, 000036-40, 000049-51, 000058-64, 000072-83, 000085-100, 000111, 000119, 000121, 000125-141, 000153-362, 000364-368, 000451-463, 00490-496, 000586, 000584, 000592, 000599, 000607-617, 000619, 000633, 000641, 000645-6, 000656, 000660, 000676, 000687-763, 000766-916; STONE_000173; STONE_CONF_0000001-5, 000009-11, 000017-25, 000041-46, 000049-51, 000056-64, 000072-83, 000090-97, 000111, 000119, 000121, 000125-141, 000586, 000584, 000592, 000599, 000607-617, 000619, 000633, 000641, 000645-6, 000656, 000660, 000676, 000687-763, 000766-916.

72. Mr. Stone believes that the injuries he received while playing in the NFL were caused, aggravated, extended, worsened, prolonged, exacerbated, intensified, perpetuated, protracted, or made permanent by the wrongful administration of Medications to him. Many of the injuries identified above were known only generally to Mr. Stone at the time of their

occurrence; the specific nature or details of the injuries were generally withheld from Mr. Stone. Moreover, Mr. Stone was never contemporaneously informed or knowledgeable that his injuries were caused, aggravated, extended, worsened, prolonged, exacerbated, intensified, perpetuated, protracted, or made permanent by the wrongful administration of Medications. Mr. Stone also states that he had more injuries than his memory or his medical records would indicate.

73. At this time, Mr. Stone seeks redress for the muscular/skeletal injuries discussed above and below.

74. Mr. Stone trusted and relied on the NFL's doctors and trainers and would not have taken the Medications in the manner and amount in which he did had the Defendant provided him with the information it was legally obligated to provide as discussed herein.

75. Plaintiff Ron Pritchard is a representative member of the putative class. As of the commencement of this action, he is a resident and citizen of Arizona. Mr. Pritchard played in 106 games as a linebacker for the AFL/NFL Houston Oilers from 1969 to 1972 and for the Cincinnati Bengals from 1972 to 1977. He is a member of the College Football Hall of Fame. He played four games in the state of New York and eight games in the state of California, where he experienced the provision of Medications described herein.

76. While playing in the NFL, Mr. Pritchard received hundreds, if not thousands, of pills from trainers, including but not limited to NSAIDs, amphetamines, Valium, Butazolidin, and Quaaludes. Mr. Pritchard received pills on game days. He also received an injection of a numbing agent in his foot in a playoff game against the Raiders. And while Pritchard played with the Oilers, amphetamines in the form of yellow and purple pills were available in jars in the locker room for any and all to take as they saw fit. Mr. Pritchard describes a routine on the nights before games

where, either at dinner or during bed check, trainers would give players sleeping pills or downers. The next morning, they would be provided uppers for practice or the game.

77. Medical records provided by his NFL teams reveal that:

- From 1969 to 1971, during his employment with the Houston Oilers, Mr. Pritchard was provided with Valium, Barbiturates, and Amphetamines;
- In 1974, during his employment with the Cincinnati Bengals, Mr. Pritchard was provided with a Renografin injection;
- In 1975 during his employment with the Cincinnati Bengals, Mr. Pritchard was provided with Butazolidin and numbing agents;
- In 1976, during his employment with the Cincinnati Bengals, Mr. Pritchard was provided with cortisone injections.

78. Mr. Pritchard further states that throughout the course of his career as a professional football player, he was provided with other unspecified Medications including but not limited to non-steroidal anti-inflammatories, pain killers, injections, and muscle relaxers, which lack detailed documentation. He does not recall the dosage of the Medications he received and, more often than not, the person providing the Medication to Mr. Pritchard did not advise him of the dosage and, to the extent the Medication was provided in a container (regardless of what type of container), the container did not identify the dosage. He never received the statutorily required warnings about side effects of any of the Medications.

79. When Ron Pritchard was traded to the Raiders, the team's head doctor told him his knees were so bad that he could not keep playing. Nonetheless, the doctor told the team that Pritchard could play as long as he could cope with the pain.

80. Those injuries stemmed in part from a serious injury he had suffered the previous season with the Bengals that required major knee surgery. Six weeks after that surgery, he was back on the field playing against the Pittsburgh Steelers.

81. Medical records provided by his NFL teams reveal that Mr. Pritchard suffered the following injuries during his NFL career:

- In 1972, he suffered a bruised hip;
- In 1973, he suffered a right knee sprain; a fractured right hand; and a dislocated middle finger;
- In 1975, he suffered a concussion and fractured right foot;
- In 1976, he suffered left knee surgery, a left groin sprain, and surgery to remove a bone spur in his right foot; and
- In 1977, he underwent two more left knee surgeries along with surgery on his right foot and right elbow and suffered a fractured right hand; a right knee sprain; and a pulled right groin.

82. Mr. Pritchard believes that the foregoing injuries were aggravated, extended, worsened, prolonged, exacerbated, intensified, perpetuated, protracted, or made permanent by the wrongful administration of Medications to him. Many of these injuries were known only generally to Mr. Pritchard at the time of their occurrence; the specific nature or details of the injuries were generally withheld from Mr. Pritchard. Moreover, Mr. Pritchard was never contemporaneously informed or knowledgeable that his injuries were caused, aggravated, extended, worsened, prolonged, exacerbated, intensified, perpetuated, protracted, or made permanent by the wrongful administration of Medications. Mr. Pritchard also states that he had more injuries than his memory or his medical records would indicate.

83. At this time, Mr. Pritchard seeks redress for the muscular/skeletal injuries discussed above and below.

84. Mr. Pritchard trusted and relied on the NFL's doctors and trainers and would not have taken the Medications in the manner and amount in which he did had the Defendant provided him with the information it was legally obligated to provide as discussed herein.

85. Plaintiff Jim McMahon is a representative member of the putative class. As of the commencement of this action, he is a resident and citizen of Arizona. Mr. McMahon played in 119 games as a quarterback for the Chicago Bears from 1982 to 1988; the San Diego Chargers in 1989; the Philadelphia Eagles from 1990 to 1992; the Minnesota Vikings in 1993; the Arizona Cardinals in 1994; and the Green Bay Packers from 1995 to 1996. He was named League Rookie of the Year in 1982; was selected to the Pro Bowl in 1985; was a two-time Super Bowl champion, and was named NFL Comeback Player of the Year in 1992. He played two games in the state of New York and twelve games in the state of California, where he experienced the provision of Medications described herein.

86. While playing in the NFL, Mr. McMahon received hundreds, if not thousands, of injections from doctors and pills from trainers, including but not limited to Percocet, Novocain injections, amphetamines, sleeping pills and muscle relaxers and NSAIDs such as Toradol. Medical records provided by his NFL teams reveal that:

- In 1984, during his employment with the Chicago Bears, Mr. McMahon was administered Marcaine and morphine;
- In 1985, during his employment with the Chicago Bears, Mr. McMahon was administered Naprosyn and prednisone;
- In 1986, during his employment with the Chicago Bears, Mr. McMahon was administered unidentified injections, lidocaine (including Xylocaine), triamterene (including Maxide), and diuretics;
- In 1988, during his employment with the Chicago Bears, Mr. McMahon was administered diclofenac (including Voltaren) and Vicodin;
- In 1989, during his employment with the San Diego Chargers, Mr. McMahon was administered aspirin (including Empirin), Anacin, Marcaine, lidocaine (including Xylocaine), dexamethasone (including Decadron), corticosteroids (including Aristospan), hydrocodone (including Damason), diclofenac (including Voltaren), Entex La, Naprosyn, phenoxymethylpenicillin (including penicillin VK), Benadryl, other anti-inflammatories, and other unidentified oral medications;

- In 1990, during his employment with the Philadelphia Eagles, Mr. McMahon was administered anti-inflammatories, phenylbutazone (including Butazolidin), muscle relaxants, cortisone, lidocaine, methylprednisone (including Depo Medrol), naproxen, and other painkillers;

- In 1991, during his employment with the Philadelphia Eagles, Mr. McMahon was administered hydromorphone (including Dilaudid), Zantac, Motrin, Marcaine, hyaluronidase (including Wydase), Medrol, analgesics, cortisone, Indocin, Novocain, Percocet, ammonium bituminosulfonate (including ichthammol), Naprosyn, valium, morphine, other anti-inflammatories, and other unidentified injections of medications;

- In 1992, during his employment with the Philadelphia Eagles, Mr. McMahon was administered Halcion, cefazolin, acetaminophen, docusate sodium (including DSS), naloxone (including Narcan), potassium, promethazine, antiemetics (including Reglan), Percocet, fentanyl (including Sublimaze), gentamicin, cortisone, Motrin, Zantac, and other unidentified intravenous, topical, and oral medications;

- In 1993, during his employment with the Minnesota Vikings, Mr. McMahon was administered Marcaine;

- In 1996, during his employment with the Green Bay Packers, Mr. McMahon was administered cefaclor.

87. Mr. McMahon further states that throughout the course of his career as a professional football player, he was also administered at various times hypnotics, Percocet, cyclobenzaprine (including Flexeril), Darvocet, phenylbutazone (including butes), Indocin, Aleve, ibuprofen, and other unidentified injections and envelopes of Medications. He does not recall the dosage of the Medications he received and, more often than not, the person providing the Medication to Mr. McMahon did not advise him of the dosage and, to the extent the Medication was provided in a container (regardless of what type of container), the container did not identify the dosage. Mr. McMahon states the he took more Medications than his memory or his medical records indicate. He never received the statutorily required warnings about side effects of any of the Medications.

88. Over the course of his career and 18 surgeries, Mr. McMahon became dependent on painkillers, a slow process that overtook him without him realizing it. At one point, he was taking as many as 100 Percocets per month, even in the off-season. After his playing career concluded, he was no longer able to obtain painkillers for free from the NFL and was forced to purchase over-the-counter painkillers to satisfy his need for medications. Over the course of that time, he has spent an extensive amount of money on such medications.

89. While McMahon was with the Bears, he received injections for six straight weeks in the 1984 season to cope with pain in his throwing hand and ten straight weeks in the 1986 season for pain in his right shoulder. In both instances, only later did he learn that he should have sat that time out and healed rather than mask the pain and return to play too early.

90. Medical records provided by his NFL teams reveal that Mr. McMahon he suffered the following injuries during his NFL career:

- In his hands, Mr. McMahon has suffered fractures, tendon avulsion, metacarpal injuries, ulnar instability, metacarpophalangeal joint degeneration, and carpal tunnel syndrome;
- In his back, Mr. McMahon has suffered strains, herniated and protruding discs, torn spinal cartilage, atrophy and hypertrophy of the ligamentum flavum, spinal canal narrowing, and fractures in his transverse vertebrae;
- In his kidneys, Mr. McMahon has suffered lacerations, contralateral renal trauma, hematuria, and renal cysts;
- In his knees, Mr. McMahon has suffered joint dislocation and effusion; sprains and twists; medial meniscus tears; patellar tendonitis; posterior cruciate ligament ruptures, arthritis, and disruption; chrondomalacia; chondral fractures; hyperextension; anterior cruciate ligament attenuation; kissing lesions; and degeneration;
- In his shoulders, Mr. McMahon has suffered dislocation, rotator cuff tears, tendonitis, impingement syndrome, Hill Sachs lesions, bone spurs, osteoarthritis, adhesive capsulitis, acromioclavicular joint degeneration; paralabral cysts; supraspinatus tears; and anterior glenoid labrum deformities;

- In his neck, Mr. McMahon has suffered sprains and strains; herniated, compressed, and protruding discs; cervical cord displacement; degeneration; and traction;
- In his hips, Mr. McMahon has suffered flexor strains;
- In his legs, Mr. McMahon has suffered pulled hamstrings and tibial contusions;
- In his ankles, Mr. McMahon has suffered calcaneofibular ligament sprains and osteoarthritis;
- In his chest, Mr. McMahon has suffered torn rib cartilage, rib fractures, strained rib muscles, and costochondral separation;
- In his elbows, Mr. McMahon has suffered contusions, tendonitis, lacerations, lateral epicondylitis, fractures, and degeneration;
- In his feet, Mr. McMahon has suffered from metatarsal sprains and tendonitis;
- In his arms, Mr. McMahon has suffered contusions and nerve damage;
- In his face, head, and brain, Mr. McMahon has suffered from headaches and cephalgia, concussions, jaw lacerations, and temporomandibular joint disorder;
- Mr. McMahon has also suffered from bowel and bladder problems; pneumonia; memory loss; ringing in his ears; insomnia; hay fever; hypertension; below-average manipulative dexterity and fine motor skills; impaired immediate and delayed free recall and recognition memory for complex visual information; below-average nonverbal problem solving and response inhibition skills; depression; anger and irritability; abnormal levels of phosphorous, triglycerides, high-density lipoprotein cholesterol, mucous threads, calcium oxalate and uric acid crystals, glucose, bilirubin, mean corpuscular hemoglobin, apolipoprotein B, and thyroid hormones; and an enlarged left atrium.

91. Mr. McMahon believes that the foregoing injuries were caused, aggravated, extended, worsened, prolonged, exacerbated, intensified, perpetuated, protracted, or made permanent by the wrongful administration of Medications to him.

92. Many of these injuries were known only generally to Mr. McMahon at the time of their occurrence; the specific nature or details of the injuries were generally withheld from Mr. McMahon. Moreover, Mr. McMahon was never contemporaneously informed or knowledgeable

that his injuries were caused, aggravated, extended, worsened, prolonged, exacerbated, intensified, perpetuated, protracted, or made permanent by the wrongful administration of Medications.

93. At this time, Mr. McMahon seeks redress for the internal organs and muscular/skeletal injuries discussed above and below.

94. Mr. McMahon trusted and relied on the NFL's doctors and trainers and would not have taken the Medications in the manner and amount in which he did had the Defendant provided him with the information it was legally obligated to provide as discussed herein.

95. Plaintiff Marcellus Wiley is a representative member of the putative class. As of the commencement of this action, he is a resident and citizen of California. Mr. Wiley played in 147 games as a defensive end for the Buffalo Bills from 1997 to 2000; the San Diego Chargers from 2001 to 2003; the Dallas Cowboys in 2004; and the Jacksonville Jaguars from 2005 to 2006. He was selected to the Pro Bowl in 2001. He played 38 games in the state of New York and 25 games in the state of California, where he experienced the provision of Medications described herein.

96. While playing in the NFL, Mr. Wiley received hundreds, if not thousands, of injections from doctors and pills from trainers, including but not limited to NSAIDs such as Toradol and Vioxx, opioids such as Hydrocodone, and sleeping pills such as Ambien.

97. Medical records provided by his NFL teams reveal that in 1999, he received Toradol after every game he played that season. Between 1999 and 2001, he received Vioxx.

98. Mr. Wiley further states that throughout the course of his career as a professional football player, he was provided with other unspecified Medications including but not limited to non-steroidal anti-inflammatories, Ambien, hydrocodone, pain killers, injections, and muscle relaxers, which lack detailed documentation. He does not recall the dosage of the Medications he

received and, more often than not, the person providing the Medication to Mr. Wiley did not advise him of the dosage and, to the extent the Medication was provided in a container (regardless of what type of container), the container did not identify the dosage. He never received the statutorily required warnings about side effects of any of the Medications.

99. These drugs were given to Mr. Wiley even when, because of potential dangerous complications, they were contraindicated for users with asthma, from which Mr. Wiley suffers. After games, these drugs were given to him along with alcohol. Mr. Wiley states that he has had asthma his whole life, something that any team doctor who reviewed his file should have known. Nonetheless, no doctor ever told him that he shouldn't take certain drugs, including but not limited to Toradol, while using his asthma inhaler.

100. While with the San Diego Chargers, named Mr. Wiley was diagnosed with a groin sprain. When he told the team doctor that the pain seemed more widespread than a simple groin sprain would produce, the doctor told him it was a bilateral groin sprain. Based on that diagnosis, Mr. Wiley thought his injury was one the NFL would expect him to play through. So he did. To do so, he received multiple injections of an unknown, pain-numbing substance throughout the remainder of the season.

101. After the season and still in pain, Mr. Wiley finally decided to seek a second opinion about his injury. Upon seeing a doctor unaffiliated with the NFL, Mr. Wiley learned that his "bilateral groin sprain" was in fact a severe tear of his abdominal wall, which required major surgery. The extent of the injury caused him lasting, intense pain – requiring even more injections and Medications to continue playing – and shortened his career.

102. Medical records provided by his NFL teams reveal that Mr. Wiley suffered the following injuries during his NFL career:

- In July 2000, he had surgery on his back;
- In September 2001, he had surgery for a fractured foot;
- In September 2002, he suffered a torn abdominal wall, for which he had surgery in March 2003; and
- In January 2004, he had a joint right labrum/rotator cuff surgery.

103. Mr. Wiley believes that the foregoing injuries were caused, aggravated, extended, worsened, prolonged, exacerbated, intensified, perpetuated, protracted, or made permanent by the wrongful administration of Medications to him. Many of these injuries were known only generally to Mr. Wiley at the time of their occurrence; the specific nature or details of the injuries were generally withheld from Mr. Wiley. Moreover, Mr. Wiley was never contemporaneously informed or knowledgeable that his injuries were caused, aggravated, extended, worsened, prolonged, exacerbated, intensified, perpetuated, protracted, or made permanent by the wrongful administration of Medications. Mr. Wiley also states that he had more injuries than his memory or his medical records would indicate.

104. At this time, Mr. Wiley seeks redress for the muscular/skeletal injuries and internal organ injuries discussed above and below.

105. Mr. Wiley trusted and relied on the NFL's doctors and trainers and would not have taken the Medications in the manner and amount in which he did had the Defendant provided him with the information it was legally obligated to provide as discussed herein.

106. Plaintiffs have attached as **Exhibit A** an excel spreadsheet with specific dates of games played by the Plaintiffs during their NFL careers. Exhibit A also lists the names of the Club doctors and trainers for each year through 2008 as provided by the Defendants during discovery in the Evans case.

II. THE STATUTE OF LIMITATIONS ON THE CLAIMS ALLEGED HEREIN AGAINST THE NFL DID NOT START RUNNING UNTIL MARCH 2014.

107. Plaintiffs Richard Dent, Jeremy Newberry, Roy Green, J.D. Hill, Keith Van Horne, Ron Stone, Ron Pritchard, and James McMahon did not learn of the facts – particularly, the facts alleged *infra* in §§ 2 – 4 of the General Allegations Section of this Complaint – constituting the claims they have pled herein against the NFL until November 2013 when they spoke with Mel Owens regarding the same. Plaintiff Marcellus Wiley did not learn of the same until May 2014, when he first saw press coverage of this suit.

108. Plaintiffs exercised reasonable diligence to try to discover the facts at issue. For example, each Plaintiff spoke to team doctors and trainers[1] on at least a yearly basis, if not more regularly, about the type and/or amount of Medications being provided to them. Plaintiffs also discussed their injuries with the same doctors and trainers as they occurred and with doctors they visited after they finished their NFL careers for the injuries and ailments described herein. But no team doctor or trainer ever told any of the Plaintiffs about the side effects of the Medications they were being given, the dangers of "cocktailing" (mixing Medications), or of the League's involvement in the recordkeeping, handling, and distribution of the Medications. And while doctors they saw after their careers concluded did tell them that some of their ailments might be the result of the amount of Medications they took during their NFL careers, no doctor ever told them of the League's involvement in the recordkeeping, handling, and distribution of the Medications (nor would one expect them to be able to, as none of these doctors had any affiliation with the NFL).

[1] Exhibit A contains a list of doctors and trainers by year for each team for whom the Plaintiffs played.

109. Finally, neither the Tokish Study nor the Wash U/ESPN Study, discussed in greater detail *infra*, reveal any information relating to the facts identified *infra* in §§ 2 – 4 of the General Allegations Section of this Complaint, and thus by themselves would not have put Plaintiffs on notice of the claims alleged herein against the NFL. In any event, Plaintiffs are not doctors or otherwise active in the medical field and thus are not the type of persons to whom those studies would have been sent or who would simply review a medical study of which they were unaware. The Tokish Study also was not distributed in popular formats such as on TV or in a publication that the average person might read, such as *ESPN The Magazine*, and while the ESPN study was, Plaintiffs do not recall ever even hearing of it until after they first talked to Mel Owens in November 2013 or, in the case of Plaintiff Wiley, after he heard about the suit on TV.

110. Thus, despite their reasonable diligence, Plaintiffs were unable to make earlier discovery of the facts identified *infra* in §§ 2 – 4 of the General Allegations Section of this Complaint.

III. THE NFL IS A RESIDENT OF THIS JUDICIAL DISTRICT.

111. Defendant NFL, which maintains its offices at 345 Park Avenue, New York, New York, is an unincorporated trade association consisting of separately-owned and independently-operated professional football teams that operate out of many different cities and states in this country. The NFL is engaged in interstate commerce in the business of, among other things, promoting, operating, and regulating the major professional football league in the United States.

112. As an unincorporated trade association of member teams, the NFL is a resident and citizen of each state in which its member teams reside, including California.

113. The NFL is a resident of the Northern District of California because it does business in this District, derives substantial revenue from its contacts with this District, and operates two franchises within this District, the Oakland Raiders and the San Francisco 49ers.

JURISDICTION

114. This Court has original jurisdiction pursuant to 28 U.S.C. § 1332(d)(2) because the proposed class consists of more than one hundred persons, the overall amount in controversy exceeds $5,000,000 exclusive of interest, costs, and attorney's fees, and at least one Plaintiff is a citizen of a State different from one Defendant. The claims can be tried jointly in that they involve common questions of law and fact that predominate over individual issues.

115. This Court has personal jurisdiction over the NFL because it does business in this District, derives substantial revenue from its contacts with this District, and operates two franchises within this District.

VENUE

116. Venue is proper pursuant to 28 U.S.C. § 1391(b)(1) because Defendant is an entity with the capacity to sue and be sued and resides, as that term is defined at 28 U.S.C. §§ 1391(c)(2) and (d), in this District where it operates two franchises.

INTRADISTRICT ASSIGNMENT

117. This matter has been assigned to the San Francisco Division.

GENERAL ALLEGATIONS APPLICABLE TO ALL COUNTS

I. FEDERAL/STATE LAW PROVIDES A DUTY REGARDING CONTROLLED SUBSTANCES, PRESCRIPTION DRUGS, AND OVER-THE-COUNTER MEDICATIONS WITH WHICH THE NFL MUST COMPLY.

A. Given the Potential Significant Detrimental Impact, Congress Imposed A Sophisticated Criminal/Regulatory Regime on Controlled Substances and Prescription Medications.

118. United States law imposes a sophisticated statutory regime that regulates the dispensation of certain medications that carry a greatly-enhanced risk of abuse and addiction ("controlled substances") and criminalizes violations of such regulations. This regime protects against the dangers of abuse and addiction inherent in the use of controlled substances such as opioids and other powerful painkillers. This regulatory regime applies to anyone involved in the dispensation of these substances, from a physician operating a solo medical practice to a multibillion-dollar machine such as the NFL.

1. The Controlled Substances Act Criminalizes the Dispensation and Possession of Medications that the NFL Routinely Gives Players.

119. In 1970, Congress enacted the Comprehensive Drug Abuse Prevention and Control Act (the "Act"). Title II of this Act, codified as 21 U.S.C. § 801, *et seq*., is known as the Controlled Substances Act or the "CSA." The CSA acknowledges that while "controlled substances" "have a useful and legitimate medical purpose and are necessary to maintain the health and general welfare," 21 U.S.C. § 801(1), the risk of addiction associated with such substances requires a sophisticated regime regulating their manufacture, dispensation, importation, use, distribution, and possession.

120. Regulation and enforcement of the CSA is delegated to the Food and Drug Administration ("FDA"), the Drug Enforcement Administration ("DEA"), and the Federal Bureau of Investigation ("FBI").

121. The CSA[2] organizes controlled substances into five categories, or schedules, that the DEA and FDA publish annually and update on an as-needed basis. The controlled substances in each schedule are grouped according to accepted medical use, potential risk for abuse, and

[2] Medications regulated by the CSA also constitute prescription medications under the Food, Drug and Cosmetic Act, thereby requiring a prescription before they can be dispensed.

psychological/physical effects.

122. Abuse of Schedule IV controlled substances "may lead to limited physical dependence or psychological dependence relative to the drugs or other substances in schedule III." 21 U.S.C. § 812(b)(4)(C). Among the medications listed as Schedule IV controlled substances are Ambien, Valium, Librium and Halcion.

123. Abuse of Schedule III controlled substances "may lead to moderate or low physical dependence or high psychological dependence." 21 U.S.C. § 812(b)(3)(C). Among the medications listed as Schedule III controlled substances are opioids and NSAIDs such as Vicodin[3] and acetaminophen with codeine.

124. Schedule II controlled substances, which include cocaine and heroin, have "a high potential for abuse" that "may lead to severe psychological or physical dependence." 21 U.S.C. § 812(b)(2). Among the Schedule II controlled substances the NFL gave its players are opioids such as Codeine and Oxycodone and stimulants like Amphetamines and Methamphetamines.

125. Under authority provided by the CSA at 21 U.S.C. § 821, the United States Attorney General can promulgate (and has promulgated) regulations implementing the CSA.

[3] On October 24, 2013, the FDA announced it would recommend to the Department of Health and Human Services that hydrocodone products such as Vicodin should be re-classified as Schedule II medications. On August 22, 2014, the Drug Enforcement Agency published its Final Rule in the Federal Register to reschedule hydrocodone products to Schedule II of the CSA. A copy of the final rule can be found here: http://www.gpo.gov/fdsys/pkg/FR-2014-08-22/pdf/2014-19922.pdf (last visited Nov. 26, 2018).

a. The CSA's Regulatory Regime.

126. The CSA contains a number of provisions governing the dispensation,[4] use, distribution, and possession of controlled substances. Under the CSA, "[e]very person who manufactures or distributes any controlled substance[,]" or "who proposes to engage in the manufacture or distribution of any controlled substance[,] … [or] who dispenses, or who proposes to dispense, any controlled substance," shall obtain from the Attorney General a registration "issued in accordance with the rules and regulations promulgated by [the Attorney General]." *Id.* at § 822(a)(1)-(2).

127. To distribute Schedule II or III controlled substances, applicants must establish that they: (a) maintain "effective control[s] against diversion of particular controlled substances into other than legitimate medical, scientific, and industrial channels;" (b) comply "with applicable State and local law;" and (c) satisfy other public health and safety considerations, including past experience and the presence of any prior convictions related to the manufacture, distribution, or dispensation of controlled substances. *Id.* at § 823(b).

128. The CSA mandates that controlled substances may be legally dispensed only by a practitioner or pursuant to a practitioner's prescription (as similarly established by 21 U.S.C. § 353) and within the purview of the practitioner's registration. *Id.* at § 829.

129. Moreover, Schedule II substances cannot be re-filled, *see id.* at § 829(a), while Schedule III and IV substances cannot be re-filled more than six months after the initial dispensation or more than five times "unless renewed by the practitioner." 21 U.S.C. § 829(b).

130. Only those prescriptions "issued for a legitimate medical purpose by an

[4] The CSA defines the dispensation of a controlled substance as the delivery of a controlled substance "to an ultimate user … by, or pursuant to the lawful order of, a practitioner, including the prescribing and administering of a controlled substance[.]" 21 U.S.C. § 802(10).

individual practitioner acting in the usual course of his professional practice" may be used to legally dispense a controlled substance under § 829(b). 21 C.F.R. § 1306.04(a) (2013).

131. The CSA also establishes specific recordkeeping requirements for those registered to dispense controlled substances scheduled thereunder. For example, except for practitioners prescribing controlled substances within the lawful course of their practices, the CSA requires the maintenance and availability of "a complete and accurate record of each substance manufactured, received, sold, delivered, or otherwise disposed." 21 U.S.C. § 827(c).

132. The CSA's recordkeeping regulations require a person registered and authorized to dispense controlled substances to maintain records regarding both the substances' prior manufacturing and the subsequent dispensing of the substance. Such records must include the name and amount of the substances distributed and dispensed, the date of acquisition and dispensing, certain information about the person from whom the substances were acquired and dispensed to, and the identity of any individual who dispensed or administered the substance on behalf of the dispenser. 21 C.F.R. § 1304(22)(c) (2013).

133. Beyond specific recordkeeping, all registrants "shall [also] provide effective controls and procedures to guard against theft and diversion of controlled substances." 21 C.F.R. § 1301.71(a) (2013). Depending on the schedule assigned to a particular controlled substance, such substances must be securely locked within a safe or cabinet or other approved enclosures or areas. *Id.* at §§ .72(b) & .75(b) (2013). Any theft or significant loss of controlled substances must be reported to the DEA upon discovery of the theft or loss. *Id.* at § .74(c) (2013).

b. <u>The CSA's Criminal Regime</u>.

134. The CSA enacted a comprehensive criminal regime to penalize violations of its rules and regulations.

135. Specifically, Part D of the CSA proscribes a series of "Prohibited Acts" that run the gamut from trafficking of controlled substances to their unlawful possession.

136. For example, it is unlawful for any person to knowingly or intentionally "distribute, or dispense, or possess with intent to … distribute, or dispense, a controlled substance[]" in violation of the CSA. 21 U.S.C. § 841(a)(1).

137. Each and every single violation of this section that involves a "Schedule III" controlled substance is a Federal felony subject to a variety of penalties, including but not limited to a term of imprisonment of up to ten years (15 years if the violation results in death or serious bodily injury) and a fine of $500,000 if the violator is an individual to $2,500,000 if the violator is not an individual (for first offenses). *Id*. at § 841(b)(1)(E)(i). These penalties are ***doubled*** if the violator has a prior conviction for a felony drug offense. *Id*. at §841(b)(1)(E)(ii).

138. It is also unlawful for anyone with a CSA registration to:

- "distribute or dispense a controlled substance" without a prescription or in a fashion that exceeds that person's registered authority. *Id*. at § 842(a)(1)-(2);
- distribute a controlled substance in a commercial container that does not contain the appropriate identifying symbol or label, as provided under 21 U.S.C. § 321(k), or to "remove, alter, or obliterate" such an identifying symbol or label. *Id*. at §§ 825, 842(a)(3)-(4); or
- "refuse or negligently fail to make, keep, or furnish any record, report, notification, declaration, order or order form, statement, invoice, or information required" under the CSA. *Id*. at § 842(a)(5).

A person who violates any of these provisions is subject to a minimum civil penalty up to $25,000. *Id.* at § 842(c)(1)(A).

139. It is also unlawful for a person "knowingly or intentionally to possess a controlled substance unless such substance was obtained directly, or pursuant to a valid prescription or order,

from a practitioner, while acting in the course of his professional practice, or except as otherwise authorized" under the CSA. *Id*. at § 844(a).

140. A violation of this provision is subject to a term of imprisonment of up to one year and a fine of up to $1,000 for a first offense. *Id*. Multiple violations of this provision result in a term of imprisonment of up to three years and a fine of at least $5,000. *Id*.

141. Furthermore, "[a]ny person who attempts or conspires to commit any offense" described above "shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy." *Id*. at § 846.

142. Except as authorized by the CSA, it is unlawful to "knowingly open, lease, rent, use, or maintain any place, whether permanently or temporarily, for the purpose of distributing or using controlled substance" or to "manage or control any place, whether permanently or temporarily, either as an owner, lessee, agent, employee, occupant, or mortgagee, and knowingly and intentionally rent, lease, profit from, or make available for use, with or without compensation, the place for the purpose of unlawfully manufacturing, storing, distributing, or using a controlled substance." *Id.* at § 856(a). A violation of this section results in a term of imprisonment of up to 20 years and a fine of $500,000 if the violator is an individual or up to $2,000,000 if the violator is not an individual. *Id*. at § 856(b).

143. For decades, the NFL's lack of appropriate prescriptions, failure to keep proper records, refusal to explain side effects, lack of individual patient evaluation, proper diagnosis and attention, and use of trainers to distribute Schedule II and III controlled substances to its players, including Plaintiffs, individually and collectively violate the foregoing criminal and regulatory regime. In doing so, the NFL not only left its former players injured, damaged and/or addicted, but also committed innumerable violations of the CSA.

2. The Food, Drug, and Cosmetic Act Prohibits the Dispensation of Controlled Substances Without a Prescription.

144. A significant complement to the foregoing statutory regime is the Food, Drug, and Cosmetic Act (the "FDCA"). Enacted by Congress in 1938 to supplant the Pure Food and Drug Act of 1906, the FDCA prohibits the marketing or sale of medications in interstate commerce without prior approval from the FDA, the agency to which Congress has delegated regulatory and enforcement authority. *See* 21 U.S.C. § 331(d).

145. The FDCA has been regularly amended since its enactment. Most notably, changes in 1951 established the first comprehensive scheme governing the public sale of prescription pharmaceuticals as opposed to "over-the-counter" medications. The purpose of this regulatory regime was to ensure that the public was protected from abuses related to the sale of powerful prescription medications.

146. Pursuant to this amendment, the FDCA provides that if a covered drug has "toxicity or other potentiality for harmful effect" that makes its use unsafe unless "under the supervision of a practitioner licensed by law to administer such drug[,]" it can be dispensed only through a written prescription from "a practitioner licensed by law to administer such drug." 21 U.S.C. § 353(b)(1). Any oral prescription must be "reduced promptly to writing and filed by the pharmacist" and any refill of such a prescription must similarly be authorized. *Id*.

147. Jurisprudence interpreting the FDCA establishes that a proper "prescription" under the FDCA shall include directions for the preparation and administration of any medicine, remedy, or drug for an actual patient deemed to require such medicine, remedy, or drug following some sort of examination or consultation with a licensed doctor. Conversely, a "prescription" does not mean any mere scrape of paper signed by a doctor for medications.

148. As a result, a key element in determining whether or not § 353(b)(1) has been

violated is the existence (or non-existence) of a doctor-patient relationship from which the "prescription" was issued.

149. The FDCA further provides that the prescribing medical professional shall be the patient's primary contact and information source on such prescription medications and their effects. *Id*. at §§ 352, 353. As such, regulations promulgated by the FDA require medical professionals to provide warnings to patients about such effects.

150. Dispensers violate the FDCA if they knowingly and in bad faith dispense medications without a prescription or with the intent to mislead or defraud. 21 U.S.C. §§ 331(a) & 333(a)(2).

151. Dispensing a drug without a prescription, as NFL doctors and trainers regularly did, results in the drug being considered "misbranded" while it is held for sale. *Id* at § 353(b)(1). The FDCA prohibits: (a) introducing, or delivering for introduction, a misbranded drug into interstate commerce; (b) misbranding a drug already in interstate commerce; or (c) receiving a misbranded drug "in interstate commerce, or the delivery or proffered delivery thereof for pay or otherwise[.]" 21 U.S.C. §§ 331(a) – (c).

152. It is also an FDCA violation to provide, as NFL doctors and trainers routinely did, a prescription drug without the proper FDA-approved label. *Id.* at § 352; 21 C.F.R. §§ 201.50 – 201.57 (2013). Stringent regulations dictate specific information that must be provided on a prescription drug's labeling, the order in which such information is to be provided, and even specific "verbatim statements" that must be provided in certain circumstances, such as the reporting of "suspected adverse reactions." *See generally* 21 C.F.R. §§ 201.56, .57, .80 (2013).

153. For instance, labeling for any covered medication approved by the FDA prior to June 30, 2001 must include information regarding its description, clinical pharmacology,

indications and usage, contraindications, warnings, precautions, adverse reactions, drug abuse and dependence, overdosage, dosage and administration, and how it was supplied, to be labeled in this specific order. *See* 21 C.F.R. § 201.56(e)(1) (2013).

154. Such information must be provided under the foregoing headings in accordance with 21 C.F.R. §§ 201.80(a)-(k) (2013). For example, labeling regarding a covered drug's tendency for abuse and dependence "shall state the types of abuse [based primarily on human data and human experience] that can occur with the drug and the adverse reactions pertinent to them." *See id.* at § 201.80(h)(2) (2013).

155. Covered medications approved by the FDA after June 30, 2001 are subject to even more stringent labeling requirements. *See generally* 21 C.F.R. §§ 201.56(d)(1); .57(a) – (c) (2013). For instance, labeling for such covered drugs must provide: (a) if the covered drug is a controlled substance, the applicable schedule; (b) "the types of abuse that can occur with the drug and the adverse reactions pertinent to them[;]" and (c) the "characteristic effects resulting from both psychological and physical dependence that occur with the drug and must identify the quantity of the drug over a period of time that may lead to tolerance or dependence, or both." *See* 21 C.F.R. § 201.57(c)(10) (2013).

156. The NFL's use of trainers to distribute Medications, lack of appropriate prescriptions, failure to keep records, refusal to explain side effects, and lack of individual patient care, individually and collectively, violate the FDCA.

B. All 50 States Plus the District of Columbia Have Corresponding Laws That Regulate Controlled Substances and Prescription Medications.

157. The Act expressly contemplates that the States will implement their own laws regulating controlled substances and prescription medications. All states do have such laws. Many states' laws are stricter than the CSA. For example, California has enacted the Pharmacy Law,

Calif. Bus. & Prof. Code §§ 4000, *et seq.* that extensively regulates prescription drugs such as Toradol as well as the Sherman Food, Drug and Cosmetic Laws, Calif. Health & Safety Code §§ 109910 & 110045, which largely mirrors the FDCA.

158. Since the NFL has a duty to operate its business in a lawful manner, the foregoing federal laws and regulations apply to the League and, to the extent the League operates in a state with corresponding laws, those state laws apply to the League too.

II. THE LEAGUE VOLUNTARILY UNDERTOOK A DUTY TO ITS PLAYERS WITH REGARD TO THE ADMINISTRATION OF MEDICATIONS.

159. The League implemented its initial drug program in 1973 under the direction of Dr. Walter F. Riker. From the outset, the focus of that program was on the administration and distribution of the Medications at issue here.

160. In 1984, Dr. Forrest Tennant took over Dr. Riker's responsibilities and continued the program he had put in place.

161. In 1990, the NFL's drug program split. Responsibility for steroid oversight went to Dr. John Lombardo whereas the Dr. Lawrence Brown was tasked with oversight of the administration of the Medications. Dr. Brown continues to oversee that program today.

162. Regardless of whether it was under the watch of Dr. Riker, Tennant or Brown, since its inception, this program has required teams and their doctors to report to the NFL regarding the administration of Medications while the League in turn has undertaken the duty of overseeing that administration.

163. For example, at some point, the League began auditing the clubs' compliance with the foregoing laws. Documents produced in *Evans* include hundreds, if not thousands, of such audits for every club stretching back until at least 1990 in which the clubs were required to report

to the League the types of drugs being administered, the amounts in which they were administered, violations of applicable laws they encountered, and other information required by the League.

164. Moreover, the League has funded studies relating to the Medications. For example, in 2012, Dr. Mathew Matava, team doctor for the St. Louis Rams and then president-elect of the NFL Physicians Society ("NFLPS"), formed a task force to examine the use of Toradol and provide recommendations regarding the future use of the substance in the NFL: Matthew Matava *et al.*, "Recommendations of the National Football League Physician Society Task Force on the Use of Toradol Ketorolac in the National Football League," 4 *Sports Health* 5: 377-83 (2012) (hereinafter "Task Force Recommendations").

165. In an e-mail dated February 12, 2012, Dr. Matava described their "task [as requiring them] to formulate a 'best practice' recommendation for the other members of the NFL Team Physician Society and to Commissioner Goodell."

166. The Task Force was the brainchild of Dr. Yates, who appointed an *ad hoc* committee to look into the issue because of negative press the NFL was receiving. Funding for the work came from the League, according to Dr. Yates. Dr. Matava, and possibly Dr. Yates, met with Commissioner Goodell in New York to discuss the *ad hoc* Toradol committee prior to it being formed in or around January 2012.

167. The task force recognized that a decade had passed since the only other study to look at Toradol in professional sports took place. JM Tokish, *et al.*, "Ketorolac Use in the National Football League: Prevalence, Efficacy, and Adverse Effects," *Phys Sportsmed* 30(9): 19-24 (2002) (hereinafter the "Tokish Study").

168. The Tokish Study sent questionnaires to the head team physician and the head athletic trainer of each of the NFL's 32 teams, with 30 of them responding. In addition to finding

that 28 of those 30 teams administered Toradol injections during the 2000 season, the Tokish Study also found the following:

- Of the 28 teams that used the drug, an average of 15 players were given injections (this answer ranged from 2 players to 35 players); and
- Twenty-six of the 28 teams used Toradol on game day.

169. One team had a policy of no use within 48 hours of games, and another team had a policy of no use within 12 hours of games.

170. Toradol has the potential for severe complications such as bleeding and renal damage. In fact, the two teams that did not use Toradol injections had strong policies against its use, citing potential complications, including renal failure and increased risk of bleeding.

171. Some players did experience Toradol complications; six teams reported at least one adverse outcome relating to Toradol use. Specifically, four teams noted muscle injury, one documented a case of gastrointestinal symptoms that resolved with cessation of Toradol use, and one reported that a player had increased generalized soreness one day after injection.

172. The Tokish Study concluded that "given that bleeding times are prolonged by 50% 4 hours after a single [shot of Toradol use] on game day may deserve reconsideration in contact sports." The study then called for additional investigation and sought the development of standardized guidelines for Toradol use in athletes.

173. A memorandum entitled "Issues for the NFL Team Physician" from the KC Orthopedic Institute and dated February 18, 2003 states: "Off-label use of Medications – There are a large number of NFL teams that use Toradol in an off-label method. It is designed to be used for the treatment of a painful condition as a short course of either IM or IV administration, followed by oral administration for a maximum of 5 days consecutively. Most of the team doctors use it as a method to limit pain before the onset or as a chronic treatment with players receiving weekly

doses. I have spoken to the company in the past and the use as a weekly dosing is off-label. Chronic and long-term use is not approved. Your patient needs to be advised of this."

174. On the same day, Brad C. Brown, PFATS secretary, kept the minutes of PFATS winter meeting held at the Combine in Indianapolis. Those minutes reflect that Dean Kleinschmidt reported to the group assembled (open to all NFL trainers) on the meeting of the Drug Abuse Committee as follows: "Those athletic trainers that have to contend with the NFL drug audit, the committee has determined that the special care given to toradol and Vicodin in the reporting will no longer be necessary as, these two drugs have not shown any significant problem." In other words, at the same time the Tokish Study is calling for more study and the KC document is advising of risks associated with Toradol, the NFL collective decided to stop reporting about it.

175. Over a decade later, the Matava task force determined that standardized guidelines still had not been implemented and that Toradol use had increased in the NFL during the intervening period.

176. Therefore, the purpose of the task force was to "[p]rovide NFL physicians with therapeutic guidelines on the use of [Toradol] to decrease the potential risk of severe complications associated with NSAIDs – in particular, the increased risk of hemorrhage resulting from a significant collision or trauma."

177. The task force recommended that:

- ***Toradol should not be administered prophylactically*** "prior to collision sports such as football, where the risk of internal hemorrhage may be serious" in light of the FDA's admonition "that [the drug] not be used as a prophylactic medication prior to major surgery or where significant bleeding may occur."

- ***Toradol should not be used "to reduce the anticipated pain, during, as well as after competition"*** because "[t]he perception of NFL players getting 'shot up' before competition has shed an unfavorable light on the NFL as well as on team physicians who are perceived as being complicit with the players' desire to play at all costs, irrespective of the medical consequences."

- If Toradol is to be administered, ***it should be given orally and not through the more aggressive injections/intramuscularly***. The Task Force found that the greater risks associated with injections – infections, bleeding, and injury to adjacent structures – combined with quicker onset of the drug when taken orally "favors the oral route of administration."

178. In addition to audits and studies, and in pace with public awareness of the prevalence of drugs has increased, the NFL imposed a number of mandated procedures to control the drug distribution system. The NFL has required that all drugs be locked in a closet or similar locked storage facility, as mandated for years by federal law. The NFL has also required that doctors register the Clubs' facility as a storage facility for controlled substances and prescription medication, as doctors who had been distributing drugs out of locker rooms at club facilities, including away game facilities, that had not been registered by that doctor with the DEA was illegal. The NFL has also tried to require all Clubs to purchase and utilize tracking software created by a firm called SportPharm, many of which did. SportPharm collects the data and retains it in the event the NFL is questioned about their drug distribution by the DEA or an appropriate state agency.

179. The NFL also exerts control over each Club's relationship with its medical marketing partners and its Club doctors. Clubs are obligated to review any proposed medical sponsorship arrangement with the NFL in advance of finalizing any such agreement. The Clubs' hiring of their doctors must also be approved by the League to ensure that the marketing arrangement is not mandating the hiring of its doctors.

180. The NFL also exerts control over, and constant monitoring of, the storage and administration of controlled substances and prescription drugs through their agent, the NFL Security Office. NFL Security Office personnel regularly meet and consult with club officials, including doctors and trainers, and conduct regular audits of club record keeping and facilities.

181. The NFL imposed a uniform Toradol waiver beginning with the 2010 season, a sample copy of which is attached hereto as **Exhibit B**. Every player on each Club was asked to sign the waiver, which is identical for each Club.

182. Finally, the League funded the current "visiting team medical liaison program," as testified to by Dr. Yates, whereby independent local physicians provide controlled substances to visiting teams as needed. According to Dr. Yates, the impetus for that program, which went into place in 2015, were raids conducted by the DEA in October 2014 of various clubs to see if they were still illegally traveling with controlled substances. As the Clubs were tipped off by a DEA employee in advance of the raids, not surprisingly, none of them were carrying controlled substances at the time.

III. THE LEAGUE HAS KNOWN OF THE PROBLEMS IDENTIFIED HEREIN FOR DECADES.

183. NFL officials regularly meet with team personnel, including doctors and trainers. The trainers are mandated by the NFL to meet on at least a yearly basis while the doctors meet at least annually at the Combine. These regular meetings, which have been taking place for decades, provide the NFL with the chance to share information with the Clubs to which the public is not privy. And as detailed herein, e-mails are sent *en masse* to all trainers or doctors about medications and trainers or doctors from one team communicate with trainers or doctors from other teams about medications via e-mail (*see, e.g.*, the Dr. Chao e-mail to the New Orleans Saints trainer identified herein) or, as Drs. Rettig and Matava testified to, before and after games. The Commissioner attends NFLPS meetings; NFLPS executive committee members attend owners' meetings and NFL Management Council meetings, and lurking in the background are Drs. Brown and Pellman, the NFL doctors who supervise the Club doctors.

184. The NFLPS is governed by an executive committee that regularly interacts with the League. For example, Dr. Anthony Yates (Steelers' doctor), who served on that committee from 2000 to 2015 and is a former NFLPS president, testified at his deposition that Elliott Pellman, in his capacity as medical advisor to the League, was a regular attendee of NFLPS executive committee meetings. He further testified that Dr. Brown also attended such meetings, including, for example, the February 11, 1995 meeting at the Westin Hotel in Indianapolis and the February 7, 1998 meeting at the Hyatt Regency Hotel in Indianapolis. Other League officials attended these meetings too, including Ed Teitge, who gave a 30 minute presentation on labor relations in the NFL at the aforementioned 1998 meeting; Adolpho Birch, who attended the February 21, 2003 meeting at the Westin Hotel in Indianapolis (along with Dr. Brown), and Commissioner Goodell, who attended the February 23, 2012 NFLPS executive board meeting.

185. Dr. Yates also testified that Dr. John York, an owner of the San Francisco 49ers who was also chairman of the owners' health and safety committee, would attend NFLPS meetings and events, including the 2013 executive committee meeting at the Combine. Dr. Yates called Dr. York "an important resource to and advocate for the team physicians and athletic trainers for all 32 clubs" at the 2013 NFLPS business meeting.

186. He further testified that he attended "one or two" owners' health and safety committee meetings and was present at the League's New York offices once or twice a year while he was NFLPS president.

187. Dr. Matava (Rams' doctor) testified that, while president, he too attended owners' health and safety committee meetings and regularly visited the League's New York offices for meetings. Both he and Dr. Yates testified that, while serving as president of the NFLPS, they

attended, and gave presentations regarding medications (including Toradol) at, owners' meetings, the Toradol meeting having occurred in March 2013.

188. Moreover, the League, through Dr. Brown and the Club physicians, has audited the use of controlled substances since the late 1970s according to documents produced by Dr. Brown. For example, a March 1, 2013 memorandum prepared by Dr. Brown (in which he is styled as "Medical Advisor National Football League") for Adolpho Birch, Senior Vice President of Law and Labor Policy for the NFL Management Council, covers the then nearly 40 year history of the NFL Prescription Drug Program and Protocol, which apparently had "evolved … dramatical[ly] in the last two years" (which happen to be the two years after the DEA investigated the Clubs, as discussed herein). In that memorandum, Dr. Brown notes that the players' "health and safety" were major reasons for the existence of the Prescription Drug Program and Protocol from its inception through the time that memorandum was prepared.

189. In a final report published May 30, 1990, Forest Tennant, the League's Drug Advisor, notes in relevant part that audits conducted by the League of the Clubs' use of controlled substances reveal in relevant part that "[s]ome Clubs don't seem to know which drugs are controlled substances, and some don't apparently understand the necessity (and law) to keep dispensing logs and an internal audit. A review of Clubs logs and internal audits … reveal excellent tracking by some … and some other Clubs do not have enough documentation to know if controlled substances are accounted for." An audit from the very next year states that "[m]any teams lack evidence of a copy of the current DEA registration for each prescribing physician" and that a "significant number of teams store/stock controlled substances in devices of questionable compliance to governmental regulations."

190. In a drug audit dated October 24, 1995 for the Philadelphia Eagles that went to Dr. Brown (who took over from Dr. Tennant) it was noted that the Eagles' Dr. Torg used the athletic trainer's name, rather than the player's name, on prescriptions.

191. In 1997, one General Manager said that painkiller abuse was "one of the biggest problems facing the league right now." He said the League was trying to fix the problem, but described painkiller use among players as "the climate of the sport."

192. At the NFLPS business meeting held on February 7, 1998, Dr. Lawrence Brown reported to the NFLPS that, during the last audit, at least "5 teams were in noncompliance with controlled substances" (and he fails to make mention of what, if anything, would be done to bring those teams into compliance).

193. And in documents produced by Dr. Brown in *Evans*, he identified several instances in which he noted that trainers were dispensing prescription drugs in violation of the law:

- An April 6, 1999 letter to Dave Kendall (Chiefs trainer);
- An April 7, 1999 letter to Brad Brown (Titans trainer); and
- An April 25, 2000 letter to Paul Sparling (Bengal trainer).

194. A document produced by Dr. Brown titled "NFL Prescription Drug Program and Protocol" and dated April 1999 states that it was drafted "to comply with regulations of the Federal Drug Enforcement Administration (DEA) as they apply to controlled substances." The program's main purpose was "to provide guidelines for the utilization of all prescription drugs provided to players and team personnel by physicians and other healthcare providers and associated the NFL clubs" and "to ensure the appropriate handling (purchase, distribution, dispensing, administration and recordkeeping)." The memorandum noted that "[t]he focus of the Program will remain on diuretics, non-steroidal anti-inflammatory drugs ... and all controlled drugs" and the Program's

emphasis was placed on "(1) the on-site audit, (2) the initial inventory and reconciliation reports, and (3) procedures used to provide controlled drugs to team personnel, to obtain prescription drugs from pharmacies, and to secure controlled drugs." The NFL Prescription Drug Program also provided the guidelines for securing controlled substances and referred to protocol for the travel container, which stated, "At all times, the travel container should be in the possession of a physician or an athletic trainer when not in a team's safe or in a locked equipment trunk/locker. Access to the locked trunk/locker should be limited to a team physician and/or athletic trainer while on the sidelines during practice or during a game. From a security perspective, a prudent definition of possession means within the effective immediate control, *i.e.*, reasonable distance and sight lines, of the physician or the trainer. This is relevant on the road as well as when a team is at home."

195. Records from a February 21, 2003 NFLPS business meeting (open to all members of the NFLPS) reflect that Dr. Brown "suggested that we work with the AOSSM [American Orthopedic Society for Sports Medicine] to develop a standard of treatment for professional athletes since we are 'outside the lines.'"

196. On March 28, 2007, Jim Anderson, the head trainer for the Rams, sent an e-mail to all the Clubs head trainers in which he summarized the 2007 Drugs of Abuse Committee Meeting and stated that: "Based on 2006 auditing results, Dr. Brown stressed the importance of properly labeled medications with current expiration dates and lot numbers. Some teams audited last fall were noted to have been adding new pill counts to old bottles already on the shelf. Each new prescription ordered for team use should be kept in its original container and not combined with pills in other containers."

197. In an e-mail dated January 7, 2008 to various team doctors and personnel, Minnesota Vikings head trainer Eric Sugarman stated "Here is week 17's fiasco ……. The following items did not match up this week. 1. Total of 16 Ambien given out was recorded – however only 11 Ambien were missing from the kit. 2. Total of 21 Toradol shots were recorded – however only 20 Toradol shots were missing from the kit. 3. Total of 1 Diphenhydramine shots were missing with no record of dispensing. There have been several times where the drug sheet and restock sheet didn't match but it was easily reconciled that day. There have been two incidences of drugs that have not been accounted for at all. 1. 12/17/07 – Missing all 12 pills of cyclobenzaprine. 2. 12/23/07 – Missing all 10 pills of SMZ/TMP 800-160 mg. In the case of the SMZ/TMP the whole bottle itself was missing from the kit."

198. The Falcons' memorandum referenced above also stated in relevant part that: "On 4 NFL regulated medications (medication that we have to report to the NFL on our reports/medication that is counted during the on-site audit), our numbers do not match our League summary report (Norco, Lomotil, Ambien CR, Celebrex 400mg). Also countless antibiotics and non-regulated drugs were missing or not accounted for. Controlled drugs, including narcotics, were kept in an unlocked case, outside the safe. This has been addressed and all controlled drugs are now in the safe as mandated by the NFL and State Laws. ***Strongly suggested by the NFL that the Head Team physician be present for the on-site drug audit (to answer dispensation questions and review of procedures), unfortunately, our team physician has never taken part in this process***. More medication on-site causes unnecessary expenses (most drugs have a limited shelf life and must be returned, if not used, without credit). More problems tracking larger number of medications, more difficulty staying compliant with State Laws. We just returned to Sports Pharm a large number of medications that were expired or that we had in too large of a quantity. So far

returned were 92 Toradol 10mg, 46 Lortab, 28 Toradol 30 mg/injectable, 279 Ultram (non-narcotic pain medication). Last year the team spent approximately $100,000 in various medications. To compare, we spent approximately $ 21,000 on medication in Cleveland. This shows a lack of a thorough inventory system and of control on dispensation. We were told that there was $18,000.00 worth of improper billing of medications on player's insurance (Cigna). This raised a red flag at the Players Benefits Program at the League Office. A number of NFL teams, improperly billed player's insurance but the largest amount was with the Falcons. This amount almost resulted in a fine to the club in order to repay the insurance Company. ***The League decided to pay these fines and better educate the teams and trainers.*** We were also under the radar of the DEA because of the large amount of controlled substances ordered" (emphasis added).

199. In a May 22, 2008 e-mail from Dr. Brown to several Head Trainers, he states that he "had an opportunity to discuss many of the issues with the NFL Management Council" – those issues being the trainers' concerns with their ability to meet requirements related to "storage, record-keeping administration, and dispensing of prescription drugs, especially the controlled drugs that have a high abuse liability and are under the highest levels of scrutiny at both the state and federal level." He goes on to state in that e-mail that "the timing of this initiative was not within [his] domain of decision-making [but that] the NFL Management Council has agreed to [his] decision to modify the deadlines [for reporting] for this year."

200. Yet two years later, when the DEA investigated the clubs, nothing had changed. The clubs still did not understand – and were in woeful non-compliance with – the law regarding controlled substances, as evidenced by the many, many violations thereof as testified to by Drs. Matava, Rettig, Kuykendall, and Marzo, among others and detailed herein.

201. A memorandum[5] obtained from the Atlanta Falcons memorializes a phone call between Rob Geoffroy, the Falcons' Vice President of Finance, Marty Lauzon, the Falcons' Director of Sports Medicine and Performance, Danny Long, an assistant trainer for the Falcons, and Mary Ann Fleming, NFL Director of Benefits, that states in relevant part that "the medication dispensation log contains no physician signatures; there is no control from the doctor to know exactly what has been given to players and what type of communication exists between the trainers and the physician; there is no evidence that the doctor actually knows what medication has been given to the players. This log is in the doctors' office, next to the safe, with the doctor having passing out medication before without signing or putting his initials next to the transaction."

202. But Dr. Pierce Scranton, NFLPS secretary/treasurer, warned the membership on March 3, 1991 that club doctors needed to stop their practice of allowing trainers to dispense drugs: "Briefly, only one Club out of nineteen that responded, had no OTC medication available, and no prescription medication available. Surprisingly, up to nine Clubs of the nineteen surveyed had some nonsteroidal anti-inflammatory medication that was available, which the trainers stated was given out to players by the trainer, if requested. Physician monitoring, according to the Survey, was not done for the medications which you see checked. For those who answered in the affirmative in this regard, you may wish to check your local State laws, as in the State of Washington, it is illegal for anyone but a licensed physician, or a pharmacist, to dispense medication from the training room, which is prescription in nature. For the protection of your trainers and the Club, you may wish to address that issue."

[5] While the memorandum is undated, upon information and belief, the phone conversation it memorializes was referenced in an e-mail dated May 18, 2010 from Mr. Lauzon to Thomas Demitroff, the Falcons' General Manager.

203. Apparently the Falcons, Bengals, Titans, Chiefs, Texans, *etc.* did not check their laws as Dr. Scranton advised them to, or if they did, they failed to adhere to them.

204. Team doctors also gave reports directly to the League about the Medications. Dr. Matava (Rams' doctor) testified that, while president, he attended owners' health and safety committee meetings and regularly visited the League's New York offices for meetings. Both he and Dr. Yates testified that, while serving as president of the NFLPS, they attended, and gave presentations regarding medications (including Toradol) at, owners' meetings, the Toradol meeting having occurred in March 2013.

205. A document titled "NFL Prescription Drug Program Advisory Committee Major Findings and Recommendations" that, per its metadata, was created and last modified on September 7, 2014, concludes in relevant part that non-physician administration and/or dispensing of medications occurs at many Clubs (despite numerous documents mentioned herein, generated before that date and circulated amongst trainers and others, that state that non-physicians cannot do so – *see, e.g.*, minutes from a February 11, 1995 NFLPS business meeting in which Dr. Brown "stated that it is illegal for trainers to dispense prescription drugs") and that a correlation between injuries and prescribing behaviors could not be determined. It recommends that the relationship between Club physician prescribing and Club win-loss performance be assessed along with the relationship between opioid prescribing and other indicators of athlete or team performance.

206. On October 13, 2014, 27 clubs responded to a League survey and noted that an average of 26.7 players (more than half of the active roster) per team took at least one dose of Toradol ***per game***.

207. The amount of drugs dispensed to players was also known by the League. And in a memo e-mailed to all Team Physicians and Head Athletic Trainers on October 31, 2008 by Dr.

Brown, he stated: "Another observation is the report of the number of prescription medication pills provided to a player on a single occasion, from as few as one to as many ***as 40 pills at one time***" (emphasis added).

208. For example, the Indianapolis Colts provided information for Medications they dispensed during the seven months that encompassed the 2004 season. The data was submitted to Dr. Brown, copying team owner Jim Irsay and general manager Bill Polian, by Hunter Smith (trainer) and Dr. Arthur Rettig (team doctor) on January 31, 2005. While the range of different types of drugs dispensed is astounding, the 900 different doses of Toradol (oral and injectable combined) and the 585 doses of Vicodin is particularly telling when one remembers that at any time during the regular season, a Club has only a 53-man roster. On information and belief, the drug usage memorialized therein was average for a club in the NFL at that time.

209. Pursuant to an audit of medications provided to the League, for the Colts, from September 30, 2009 through February 16, 2010, there were 1,172 Toradol 10mg's dispensed, 523 Toradol IM 60 mg 2ml's, and 2,396 doses of Vicodin. The next highest medication dispensed was Mucinex (1105).

210. For the Jets (at least), the usage of Toradol and Vicodin exploded between 2004 and 2009. In a January 26, 2010 e-mail from David Zuffelato to John Mellody and Joshua Koch, he provides a chart showing that in the 2008 season, the Jets dispensed 1,031 doses of oral and injectable Toradol and 1,295 doses of Vicodin (500 and 750 mg) and that, in the 2009 season, their usage of Toradol increased to 1,178 doses and Vicodin increased to 1,564 doses. On information and belief, the Jets are an average NFL club in terms of their Vicodin and Toradol usage during the times identified.

211. And for the Steelers, the numbers only go higher. In a document dated March 1,

2013 from Lawrence Brown (on NFL letterhead) to Dr. Yates (Steelers' team doctor), Dr. Brown notes that "there was documentation of dispensing by a non-physician [despite the numerous warnings that had been going around the League since the early 1990s, as documented herein]. Please re-evaluate to insure that this behavior is congruent with federal and state regulations." It also notes that during the "calendar year 2012, the [Steelers] medical staff … prescribed 7,442 doses of NSAIDs [again, 53-man roster] compared to League-wide average of 5,777 doses of NSAIDs per Club. Regarding controlled medications, [the Steelers] prescribed 2,123 doses of controlled medications compared to League-wide average of 2,270 doses of controlled medications per Club. By total doses, your Club ranks 10th in the greatest volume of NSAIDs provided by an NFL Club and 14th in the greatest volume of controlled medications provided by an NFL Club."

212. Upon information and belief, the types of problems identified above had been known to the League since at least 1973 when it first implemented its drug program.

IV. DESPITE THE FOREGOING, THE LEAGUE DID NOTHING.

213. One of the most striking aspects of the audit program described above is that, despite the thousands of pages of documented illegal violations engaged in by all the clubs, there is no follow up from the League. No system, *e.g.*, whereby a club receives a warning for a first violation and stiffer sentence for subsequent violations. Indeed, as documented herein, clubs would regularly report violations year after year and the League would simply process the information and do nothing about it. That willingness to do nothing cloaked the failings described to the League with an aura of legitimacy.

214. Indeed, even after the DEA began investigating the clubs and the League in 2010 relating to Medications, the League did nothing. That investigation began after a Chargers player

was found with 100 Vicodin in his possession after being arrested, all of which came from the Chargers' Dr. David Chao, and the Saints were involved with arbitration regarding the theft of controlled substances from their locker room. On August 11, 2010, doctors Conner (Carolina), Pellman (NFL medical advisor), Yates (Pittsburgh), Caldwell (Miami), Casolaro (Washington, D.C.), Rettig (Indianapolis), Matava (St. Louis), and Tucker (Baltimore) had a conference call to discuss that investigation.

215. Minutes of that call record the following:

- Drs. Conner, Yates, and Pellman met in the summer of 2010 with DEA representatives in Washington D.C. to open lines of communication between the DEA, the NFL and the NFLPS.
- At that meeting, which lasted two hours, the DEA gave a 78 slide PowerPoint presentation that offered the following "take home messages":
    - Written prescriptions must be patient specific and medication specific;
    - Common stock bottles must be ordered pursuant to DEA form 222;
    - A DEA registrant must have a distinct DEA number for the specific address where the drugs are stored, including facility, stadium and training camp;
    - Trainers cannot handle the stock bottles;
    - Intermediaries are not allowed to dispense controlled substances;
    - Physicians cannot travel across state lines with stock bottles;
    - Physicians cannot administer or dispense controlled substances in states where they are not registered; and
    - Physicians cannot write a prescription for controlled substances other than in the state where they are registered.

- "***We don't want to give [the DEA] the fodder that we have all been doing this wrong. We don't want to show them our deficiencies***" (emphasis added).
- The doctors agreed that things needed to change, that they had to communicate what was going on to the remainder of the NFLPS, and that the first step in doing so would be to "very carefully and very thoroughly draft info, with the help of the league attorneys, and put it on the members only area of the [NFLPS] website," which they in fact did.

216. Every doctor deposed – Kuykendall, Rettig, Matava, Chao, Yates, Pellman, and Tucker – has testified that they violated one or more of the foregoing "take home messages," also known as federal laws and regulations, while serving in their capacity as a team doctor. Indeed, Dr. Yates testified that a majority of clubs as of 2010 had trainers controlling and handling prescription medications and controlled substances when they should not have.

217. In discussing what to do about dispensing controlled substances to visiting players in an e-mail exchange dated September 8, 2010 by and among Drs. Yates, Brown, Conner and Pellman, Dr. Yates states that "In order to solve the ***NFL/DEA Dilemma*** we all need to work together and 'get along'. NONE of us are immune from scrutiny, trainers, physicians, advisors (employed or independent) ***Park Ave management*** and so on. As I've said before: ***To date, there has not been a constructive solution provide by the home NFL office other that the meet and greet with the DEA and the subsequent legal conference calls***. The information to date to the Society is one of 'Good luck' and you are on your own to decide how to adhere to 'the law'!!! ***We are where we are because of our association with the NFL***" (emphasis added).

218. On September 20, 2010, Dr. Pellman "took the liberty of putting together a list of questions/problems that been posed to me by team physicians, ATCs and administrators along with possible responses/solutions" and e-mailed the same to John Norwig (Steelers trainer) and

Steve Antonopulos (Broncos trainer). Among the items addressed in that list is a concern from "several of the team physicians … that the local physician [proposed to provide controlled substances to a visiting team to ensure compliance with the CSA] may not know much about how things are typically managed with NFL players." One of the "possible responses" to that concern is that "according to DEA[,] physicians are to prescribe controlled substances in a manner that is consistent with the standard of the medical community … not the NFL medical community."

219. In February 2011, DEA agent Joe Rannazzi came to the Combine and spoke to the NFLPS membership about the CSA and its implementing regulations and how the doctors had to abide by them. In other words, no NFL doctor in attendance could plausibly deny not being aware of these regulations after that Combine meeting.

220. And yet the NFL still failed to comply with federal law. One such example is with the relatively easy-to-understand ban on traveling with controlled substances, something with which the NFL should have been able to comply in 2011 (let alone from the time the ban was originally put in place). Attached hereto as **Exhibit C** is a chart identifying specific instances when teams travelled with controlled substances.

221. Yet it took until 2015 for the League to implement a policy that all Clubs had to follow – and then only in response to DEA raids of teams traveling with controlled substances – in which, rather than travel with controlled substances, each team had to have independent doctors registered in their home state to act as intermediaries for dispensing controlled substances to visiting teams. In the years between 2011 and the implementation of that policy, upon information and belief, many Clubs continued to travel with controlled substances, finding it necessary to comply with the League's Business Plan.

222. Another example of the lip service paid by the League is the Matava Task Force. Months after the Task Force issued its recommendations, Dr. Matava, in an e-mail to Dr. Yates, questioned the failure of team physicians to respond to surveys regarding Toradol usage: "If these guys want to give Toradol because they think it is needed or acceptable, then they should have the balls to say so. What are they afraid of?" He commented in the same e-mail that "[c]ontinued use of Toradol in the present climate is not rational." Yet upon information and belief, the "T Train" – Toradol injections before a game – kept rolling.

223. Ultimately, the Task Force findings were forwarded to Dr. Pellman at the League office and the owners according to the deposition testimony of Dr. Yates. But Dr. Yates also testified that as late as 2016, he witnessed players lining up for the "T Train," something that had been occurring with the Steelers for at least the previous 15 years.

224. In an e-mail dated September 9, 2010 from Pepper Burrus, the Packers' head trainer, to John Norwig, Steelers head trainer, Mr. Burrus states: "I expect no immediate guidance from Dr. Brown or Dr. Pellman, other than 'cover your own behind.'"

225. In an e-mail dated May 19, 2010 from Rick McKay, Falcons President, to Dr. Pellman, Mr. McKay states: "Here is an exchange that I am not happy about – this is Jeff Fish trying to get after Scott G. My question is Mary Ann Fleming (NFL Director of Benefits) recommending the replacement of our Drs. I need to know – is this really true and does she realize the on-site trainer is in control??? I need to keep this confidential." The doctors were not replaced.

226. Dr. Chao testified that he asked Dr. Pellman and Dr. Conner to tell the truth about how all Clubs were dispensing Medications in a manner similar to what the Chargers were doing but they never did.

227. On January 20, 2011, Damon Mitchell, a Chargers trainer, sent an e-mail to all NFL head trainers in which he stated: "The San Diego Chargers are conducting a survey on controlled medications. I am asking if you would complete the attached survey rather than your physician. We feel the ATCs have all of the necessary information to complete it and give us the best response rate so we may analyze the collected data accurately."

228. Dr. Chao testified emphatically that Dr. Pellman squelched the survey because, upon information and belief, it would bear out what Dr. Chao told anyone who would listen to him that what he was doing with his players was the norm for the League.

229. Knowing all of the above, the NFL continues to state publicly that its doctors provide first class health care to its players. In his response to the Harvard Report dated November 1, 2016, Jeffrey Miller, NFL Executive Vice President for Health and Safety Initiatives, stated "As is set forth in more detail below, we are proud that this shared commitment has ensured that NFL players receive unparalleled medical care, provided by world-class, highly credentialed physicians, who are supported by superior athletic trainers … NFL players are cared for by some of the world's finest medical professionals." Brian McCarthy, an NFL spokesperson, later told the Washington Post the NFL teams and their medical staffs "continue to put the health and safety of our players first, providing all NFL players with the highest quality medical care." Washington Post, "NFL doctors are on the wrong team." On information and belief, the NFL has publicly made similar statements for decades.

V. THE DAMAGE IS DONE – THE MEDICATIONS AS ADMINISTERED AND APPROVED BY THE NFL CREATE LASTING LONG-TERM HEALTH EFFECTS.

230. Leslie Z. Benet, Ph. D. is a noted expert in the fields of pharmacology and biopharmaceuties, among others. He prepared a declaration in the *Evans* matter (the "Benet Report").

231. Therein, Dr. Benet stated "In my opinion there was, at the time of drug administrations to the NFL players, clear-cut warnings in the FDA-approved package inserts for these drugs, based on sound scientific evidence, that continued use of these medications could have significant deleterious effects on the players during and beyond their active career as players in the NFL, particularly with respect to musculoskeletal morbidity, but also with respect to kidney, liver and cardiac morbidities and addiction conditions."

232. Dr. Benet also noted "In my opinion, the use of pain masking drugs leads to increased morbidity in terms of musculoskeletal, kidney, liver, cardiac and for drug addiction beyond what is experienced by NFL players who do not receive drugs to mask pain sensors indicating debilitation conditions that should be allowed to heal without constant contusions." "Of particular relevance to NFL players would be the risk for renal failure due to volume depletion and the risk of bleeding following injury."

233. Dr. Benet condemned the prophylactic use of the drugs. "There is no doubt that NFL players in their job will experience pain. However, administering drugs to NFL players prior to experiencing pain eliminates the signals to the player of actual or potential tissue damage and ultimately leads to more severe damage." Benet was particularly critical of the extensive prophylactic use of toradol. "In my opinion the fact that the NFL teams supported and condoned

the administration by team physicians of the pain killing drug toradol prior to games was an insidious action guaranteed to lead to long-term negative health effects in the NFL players."

234. According to Dr. Benet, toradol has a number of black box warnings in its package insert. A black box warning is the strictest warning put in the labeling of prescription drugs or drug products by the FDA when there is reasonable evidence of an association of a serious hazard with the drug.

235. The prominent black box warnings for toradol state that the drug is indicated for short term (up to five days in adults) management of moderately severe, acute pain that requires analgesia at the opioid level. The total combined use of toradol oral and ketorolac tromethamine should not exceed five days. This five-day limit and a daily maximum of 40 mg is states so as not to increase the risk of developing serious adverse events such as: gastrointestinal risk, cardiovascular risk, which can be fatal; renal risk, and risk of bleeding. In his opinion, it is disingenuous to believe that because a player may not be dosed with toradol continuously over a five day period that the foregoing warnings are of no consequence when players receive the drug. In short, the administration of toradol to players also taking NSAIDs such as Indocin and Naprosyn, very common in the NFL, increases the risk of liver and kidney problems, not to mention bleeding.

A. <u>More Severe and Permanent Musculoskeletal Injuries</u>.

236. The NFL's reliance on opioids, NSAIDs, anesthetics, and other medications to make its Business Plan operate effectively has also directly resulted in more severe and more permanent musculoskeletal injuries in players. Scientific research has revealed two reasons for this consequence.

237. First, opioids, NSAIDs, and anesthetics operate to "mask" pain, one of the body's

most fundamental protective mechanisms. By enabling individuals to undertake physical activity that is detrimental to recovery, drugs that mask pain heighten the severity of and render permanent injuries that would have otherwise healed.

238. According to the International Association for the Study of Pain, pain is defined as "[a]n unpleasant sensory and emotional experience associated with actual or potential tissue damage, or described in terms of such damage." Combined with swelling and limited range of motion, pain is the body's foremost defense against further injury. Because of this, the vast majority of physicians recommend a period of rest and isolation of the painful body part to allow the body part to heal and to prevent further injury.

239. Local anesthetics thwart that process as they temporarily interrupt the action of all nerve fibers, including pain-carrying ones, by interfering with the actions of sodium channels. Such medications cause a complete loss of feeling in the area into which the drug is injected, rendering ineffective all the body's normal protective mechanisms and dramatically increasing the chance of permanent injury.

240. Analgesics, including opioids and NSAIDs, block pain by inhibiting the pain-producing chemicals that cause pain. Clinically, these medications simply mask symptoms, thereby increasing the likelihood of more severe and permanent injury.

241. Second, medical science indicates that the chemical properties of certain prescription painkillers actually inhibit healing in a wide array of musculoskeletal injuries.

242. Peer-reviewed experimental studies suggest prescription painkillers have a detrimental effect on tissue-level repair of injuries and those medications have been shown to impair mechanical strength return from acute injury to bone, ligament and tendon.

243. In particular, opioids and certain NSAIDs have been linked to increased rates of

osteoporosis, increased fracture risk, diminished muscle mass, increased fat mass and anemia.

244. Medical science therefore confirms the link between the use of prescription painkillers and the astounding rates of permanent neck, back, knee, shoulder and other musculoskeletal injuries suffered by former NFL players, including Plaintiffs.

B. Long-Term Health Consequences Caused by Prescription Pain Killers.

245. The constant pain Plaintiffs and other former NFL players experience from their injuries leads directly to a host of other health problems.

246. Leading experts recognize that former NFL players who suffer from permanent musculoskeletal injuries often cannot exercise due to pain or other physical limitations, leading to a more sedentary lifestyle and to higher rates of obesity.

247. According to the Centers for Disease Control and Prevention, obesity is linked to: coronary heart disease, type-2 diabetes, endometrial cancer, colon cancer, hypertension, dyslipidemia, liver disease, gallbladder disease, sleep apnea, respiratory problems and osteoarthritis.

248. Surveys of former NFL players confirm that the players suffer from significantly higher rates of all these disorders when compared to the general population.

249. In addition, it is well established that long-term use of opioids is directly correlated with respiratory problems and these problems are made worse by use of alcohol together with opioids.

250. Long-term opioid use has also been tied to increased rates of certain types of infections, narcotic bowel syndrome, decreased liver and kidney function and to potentially fatal inflammation of the heart. Opioid use coupled with acetaminophen use has been linked to hepatic (liver) failure.

251. Long-term use of opioids has also been linked directly to sleep disorders and significantly decreased social, occupational and recreational function.

C. Health Effects Specifically Stemming From Use of NSAIDs.

252. NSAIDs are often viewed as a non-addictive "safer" alternative to narcotics. NSAIDs have been shown to be among the most highly-prescribed painkillers for athletes.

253. Despite the popular notion that NSAIDs are "safer" than other types of prescription painkillers, NSAIDs are associated with a host of adverse health consequences.

254. The two main adverse reactions associated with NSAIDs relate to their effect on the gastrointestinal ("GI") and renal systems. Medical studies have shown that high doses of prescription NSAIDs were associated with serious upper GI events, including bleeding. Additionally, GI symptoms such as heartburn, nausea, diarrhea, and fecal blood loss are among the most common side effects of NSAIDs. Medical reports have also noted that 10-30% of prescription NSAID users develop dyspepsia, 30% endoscopic abnormalities, 1-3% symptomatic gastroduodenal ulcers, and 1-3% GI bleeding that requires hospitalization. Studies also indicate that the risk of GI side effects increases in a linear fashion with the daily dose and duration of use of NSAIDs.

255. NSAIDs are also associated with a relatively high incidence of adverse effects to the renal system. Medical journal articles note that "[p]rostaglandin inhibition by NSAIDs may result in sodium retention, hypertension, edema, and hyperkalemia." One study showed the risk of renal failure was significantly higher with use of either Ketorolac or other NSAIDs and, as a result, the FDA prohibits treatment with Ketorolac for more than five continuous days.

256. Patients at risk for adverse renal events should be carefully monitored when using NSAIDs. As the NFLPS Task Force stated, such patients include those with "congestive heart

failure, renal disease, or hepatic disease[, and] also include patients with a decrease in actual or effective circulating blood volume (*e.g.*, dehydrated athletes with or without sickle cell trait), hypertensives, or patients on renin-angiotensis-aldosterone-system inhibitors (formerly ACE inhibitor) or other agents that affect potassium homeostasis."

257. Additionally, the anti-coagulatory effect of certain NSAIDs, including Ketorolac, can lead to an increased risk of hemorrhage and internal bleeding. The *Physician's Desk Reference* specifically states that the NSAID Ketorolac (Toradol) is "contraindicated as a prophylactic analgesic before any major surgery, and is contraindicated intra-operatively when hemostasis is critical because of the increased risk of bleeding."

258. Moreover, certain NSAIDs can adversely affect the cardiovascular system by increasing the risk of heart attack. Studies have shown that patients with a history of cardiac disease who use certain NSAIDs may increase their risk for heart failure up to ten times.

259. Finally, other systemic side effects associated with the use of NSAIDs include headaches, vasodilatation, asthma, weight gain related to fluid retention and increased risk for erectile dysfunction. Medical reports have also noted that "[i]ncreasing evidence suggests that regular use of NSAIDs may interfere with fracture healing" and that "[l]ong-term use of NSAIDs…has also been associated with accelerated progression of hip and knee osteoarthritis."

VI. NFL PLAYERS SUFFER INJURIES AND AILMENTS AT A RATE HIGHER THAN THE GENERAL POPULATION.

260. As former NFL player and coach Mike Ditka testified before Congress, football is "not a contact sport, it's a collision sport." With a player's average career truncated to about three and a half years, the majority of players walk away (to the extent they can) with beaten and tattered bodies.

261. Former professional football players have another name for the multiple "car

crashes" they survived each game – "plays." With violent collisions a celebrated part of the king of American sports, it is clear why so many players get carted off the field – and eventually leave the sport – with lingering aches and debilitating pain similar to those sustained in car accidents.

262. Playing in the NFL thus means playing with pain and often requires playing despite that pain. Given the violent nature of the sport, it is hardly surprising that analyses of NFL injury data reveal that over half of NFL players suffer one or more musculoskeletal injuries in a given year and the vast majority suffer significant musculoskeletal injuries throughout their careers. According to DeMaurice Smith, head of the NFLPA, pursuant to the League's own statistics, professional football has a ***100 percent injury rate***.

263. But with media attention on, and League-mandated testing solely for, performance-enhancing drugs such as steroids and HGH, the NFL has been able to hide the true performance-enhancing drugs – opioids, NSAIDs, and local anesthetics – that not only mask players' pain, allowing them to return to play long before they should, but have equal or worse effects on players' health than steroids or HGH. Hiding the truth about the Medications allowed the NFL to hide from Plaintiffs the truth about its Business Plan.

264. In 2011 by Dr. Linda Cottler of the Department of Psychiatry at Washington University published: "Injury, Pain, and Prescription Opioid Use Among Former National Football League (NFL) Players," 116 *Drug and Alcohol Dependence* 188-194 (2011) (the "Wash U / ESPN Study").

265. The Wash U / ESPN Study concluded that "no research has been published to date concerning the impact of pain and use and misuse of opioids both during and after a player's professional athletic career."

266. Dr. Eric Strain of the Department of Psychiatry and Behavioral Sciences at the

Johns Hopkins School of Medicine found that the Wash U / ESPN Study "nicely illuminates an area needing light, helping us understand a subject that has received scant attention and driving us to want to know more about a significant topic." Eric C. Strain, "Drug Use and Sport – A Commentary on: Injury, Pain and Prescription Opioid Use Among Former National Football League Football Players by Cottler *et al.*," 116 *Drug and Alcohol Dependence* 8-10 (2011).

267. The Wash U / ESPN Study surveyed 644 former NFL players "to evaluate level of pain and other factors associated with opioid misuse during their NFL career and in the past 30 days." It established that:

- 93 percent of the players sampled reported pain and 81 percent of the players perceived their pain to be moderate to severe;
- "[P]layers who misused during their NFL career were 3.2 times as likely to misuse in the past 30 days as NFL players who used just as prescribed;"
- Of the players who reported misuse in the past 30 days, "78% had a history of opioid misuse during their NFL career;"
- Comparing former players who used opioids as prescribed to those who misused, the study showed that "misusers had increased odds for poor health at retirement . . . and had 3 or more NFL injuries . . . ;"
- "Misusers were less likely than non-users . . . to report excellent health in the past 30 days . . . , more likely to report knee, shoulder and back injuries, and over 6 times as likely to report 3 or more NFL injuries;"
- "Misusers were at increased odds of having a career ending injury and nearly 8 times as likely to be using a cane, walker or wheelchair . . . compared to their non-using teammates;"
- "[T]wo additional factors were strongly associated with opioid use: requiring a cane, walker or wheelchair . . . , and having severe pain . . .;" and
- "The overall rate of misuse during NFL play was 37% . . . , a rate 2.9 times higher than a lifetime rate of non-medical use of opioids among the general population of a comparable age."

268. Ultimately, Dr. Cottler found that "[a]t the start of their careers, 88 percent of these

men said they were in excellent health. By the time they retired, that number had fallen to 18 percent, primarily due to injuries. And after retirement, their health continued to decline. Only 13 percent reported that they currently are in excellent health. They are dealing with a lot of injuries and subsequent pain from their playing days. That is why they continue to use and misuse pain medicines."

VII. PLAINTIFFS HAVE BEEN INJURED BY THE NFL'S NEGLIGENCE.

269. The named Plaintiffs rarely, if ever, received written prescriptions (or for that matter, anything in writing) for the medications they were receiving while playing in the NFL.

270. Regardless of the era, the named Plaintiffs all received the bulk of their pills not in bottles that came with directions as to use but rather in small manila envelopes that often had no directions or labeling. The player would receive the envelope and be told to take it.

271. The named Plaintiffs never received statutorily mandated warnings as to the side effects of the Medications. DeMaurice Smith, Executive Director of the NFLPA, has questioned whether the players were ever told about the risks and benefits of the Medications they were receiving from team doctors and trainers, and concluded that they generally have not. Smith stated "[y]ou don't have to walk far to find virtually every former player saying their team doctor never advised them about side effects of the medications they were taking."

272. Further, consistent with the NFL's Business Plan, NFL doctors and trainers would push to return players to the field, regardless of what injuries they had.

273. Mr. Dent suffers from an enlarged heart and nerve damage, particularly in his feet. In 1990, while playing in Seattle, Mr. Dent suffered a broken bone in his foot. He was told by team doctors and trainers at the time that he had done all the damage that could be done to that foot and that, while he therefore could have surgery, they could also supply him with painkillers

to allow him to continue playing. Trusting that the League and its team doctors and trainers had his best interests at heart, he chose to continue playing and for the following eight weeks, he received repeated injections of painkillers as well as pills to keep playing. Today, Mr. Dent has permanent nerve damage in that foot.

274. Over the course of his career, Mr. Dent became dependent on painkillers, a slow process that overtook him without him being cognizant of it happening. After his career ended, he was no longer able to obtain painkillers from the NFL and was forced to purchase over-the-counter painkillers to satisfy his need for medications. Over the course of that time, he has spent an extensive amount of money on such medications.

275. Mr. Dent also suffers from muscular skeletal pain including, but not limited to, his right big toe, left ankle, left hip, both shoulders, right wrist, fingers and hand.

276. JD Hill left the League addicted to painkillers, which he was forced to purchase on the streets to deal with his football-related pain, a path that led him to other street medications. He eventually became homeless and was in and out of 15 drug treatment centers for a period of over 20 years until overcoming his NFL-sponsored drug addiction.

277. Mr. Hill's post-NFL decline culminated in a 2005 guilty plea to Social Security fraud, though he received probation because the violations at issue occurred while Mr. Hill was in and out of drug treatment centers. He has subsequently repaid all of the money at issue.

278. Mr. Hill is now a pastor/substance abuse counselor for the Christian community. But while he has been able to clean up his life and re-establish relationships with his wife, children and grandchildren, his addiction has left deep scars, both literally and figuratively. After leaving the NFL, Mr. Hill had to take Prednisone to deal with the pain from his injuries. That Prednisone weakened his immune system. He then developed an abscess in his lung, requiring major surgery

resulting in the loss of part of a lung. In addition, he has atrial fibrillation that requires doctor-supervised medication. Mr. Hill has recently been hospitalized for blood clots. Finally, he suffers regularly from muscular-skeletal pain, including, but not limited to, his ankles, shoulders, fingers, neck and back.

279. Since retiring, Keith Van Horne has had two cardiac ablations and has suffered from, and continues to suffer from, atrial fibrillation, which began in 2004, and premature ventricular contractions. He has also suffered from tachycardia and regularly suffers from muscular-skeletal pain, including but not limited to, his arms, ankles, knees, back, biceps, neck, shoulders and elbows.

280. Since retiring from the NFL, Ron Stone has consistently suffered from muscular-skeletal pain including, but not limited to, his elbows, thumbs and knee.

281. Since retiring Ron Pritchard has had six knee surgeries and replacements for both of his knees as well as shoulder, elbow, hand and foot surgery. He suffers from muscular-skeletal pain including, but not limited to, his knees, right hand, right elbow and right foot.

282. Named Plaintiff Jim McMahon discovered for the first time in 2011 or 2012 that he had suffered a broken neck at some point in his career. He believes it happened during a 1993 playoff game when, after a hit, his legs went numb. Rather than sit out, he received Medications and was pushed back on the field. No one from the NFL ever told him of this injury. In addition, he learned only a few years ago that he had broken an ankle while playing; at the time, he was told it was a sprain.

283. In addition, Mr. McMahon suffers from arthritic pain in his hands and limited motion, as well as extreme pain, in his right shoulder. He also has muscular skeletal pain including, but not limited to, his knees, back, neck, elbows and ankles. He also has kidney problems. The

foregoing pain and limitations stem from injuries Mr. McMahon suffered while playing in the NFL that were never allowed to properly heal and were aggravated by continued play.

284. Over the course of his NFL career, Mr. McMahon also developed a dependency to the habit-forming Medications that were extensively administered to him by the NFL. Because of his addiction, he spent considerable sums of money and resources to obtain the Medications that had previously been provided to him in large quantities by the NFL.

285. Mr. Green, who received hundreds of NSAIDs (which can cause kidney damage) from NFL doctors and trainers, had tests performed on him while he played in the NFL that showed he had high creatinine levels, indicative of a limitation on his kidney function. No one from the NFL ever told him of those findings. In November 2012, he had a kidney transplant due to failing kidneys. Since retiring, he has suffered three heart attacks. He also suffers from high blood pressure. He also suffers regularly from musculo-skeletal pain, including, but not limited to, his hips, left shoulder, hands, feet, right knee and elbows.

286. Similarly, while any doctor who looked at named Plaintiff Jeremy Newberry's records should have seen the decreasing kidney function from his blood levels, Mr. Newberry was never told about that problem while with the League. Indeed, if not for one night after retiring that Newberry's blood pressure was measured at 250 over 160, at which point he was hospitalized for days, Newberry might have died from his kidney problems. He suffers from Stage 3 renal failure, high blood pressure and violent headaches for which he cannot take any medications that might further deteriorate his already-weakened kidneys. He also suffers regularly from musculo-skeletal pain, including but not limited to both knees, both shoulders, spine, left ankle and both hands.

287. In April 2014, Mr. Wiley, at age 39 and with no history of kidney disease, was hospitalized and diagnosed with partial renal failure. He had lost half of his kidney function. Mr.

Wiley continues to receive treatment and frequent medical monitoring for this condition. In addition, he regularly suffers from muscular-skeletal pain, including, but not limited to, his back, feet and right shoulder. He also had a repaired tear in his abdominal wall.

CLASS ACTION ALLEGATIONS

288. Plaintiffs adopt by reference all allegations contained in the paragraphs above, as if fully set forth herein.

289. Plaintiffs bring this action on behalf of themselves and all other similarly-situated individuals pursuant to Fed. R. Civ. P. 23, consisting of all Players, which for class purposes shall mean anyone listed on one of the Clubs' rosters from the point in a season where a final roster decision is announced (for the 2016 season, this would have been when the 53 man roster was announced on September 3, 2016) through the completion of that season, who received Medications, which for class purposes shall include, but not be limited to, Naprosyn, Indocin, Vioxx, Prednisone, and Toradol, from an NFL Club.

290. Excluded from the Class are Defendant and any entities in which Defendant or its subsidiaries or affiliates have a controlling interest, and Defendant's officers, agents, and employees.

291. The members of the Class are so numerous that joinder of all members of any Class would be impracticable. Plaintiffs reasonably believe that Class members number thousands of people in the aggregate. The names and addresses of Class members are identifiable through documents maintained by Defendant.

292. **Commonality and Predominance:** This action involves common questions of law or fact, which predominate over any questions affecting individual Class members, including, among others:

(a) Whether Defendant provided or administered Medications to the Class Members?

(b) Whether Defendant violated the Controlled Substances Act's requirements governing acquisition of controlled substances?

(c) Whether Defendant violated the Controlled Substances Act's requirements governing storage of controlled substances?

(d) Whether Defendant violated the Controlled Substances Act's requirements governing distribution of controlled substances?

(e) Whether Defendant violated the Food and Drug Act's requirements governing distribution of prescribed medications?

(f) Whether the provision or administration of Medications to Class Members, as described above, violate state pharmaceutical laws regulating the acquisition, storage and dispensing of Medications?

(g) Whether the Class Members provide informed consent authorizing the provision or administration of Medications?

(h) Whether Defendant owed a duty and breached that duty to Class Members by violating the federal and state laws described herein?

(i) Whether Defendant's breach of a duty to Class Members by failing to comply with federal and state laws governing the provision and administration of Medications proximately caused Plaintiffs' and Class Members' damages?

293. Defendant engaged in a common course of conduct giving rise to the legal rights sought to be enforced by Plaintiffs individually and on behalf of the members of the Class. Similar or identical statutory and common law violations, business practices, and injuries are involved.

Individual questions, if any, pale by comparison, in both quantity and quality, to the numerous common questions that dominate this action.

294. **Typicality**: Plaintiffs' claims are typical of the claims of the other members of the Class because, among other things, Plaintiffs and the other Class Members were injured through the substantially uniform misconduct by Defendant. Plaintiffs are advancing the same claims and legal theories on behalf of themselves and all other Class members, and there are no defenses that are unique to Plaintiffs. The claims of Plaintiffs and those of other Class Members arise from the same operative facts and are based on the same legal theories.

295. **Adequacy of Representation**: Plaintiffs are adequate representatives of the classes because their interests do not conflict with the interests of the other Class Members they seek to represent; they have retained counsel competent and experienced in complex class action litigation and Plaintiffs have and will continue to prosecute this action vigorously. The Class Members' interests will be fairly and adequately protected by Plaintiffs and their counsel.

296. **Superiority:** A class action is superior to any other available means for the fair and efficient adjudication of this controversy, and no unusual difficulties are likely to be encountered in the management of this matter as a class action. The damages, injuries, harm, or other financial detriment suffered individually by Plaintiffs and the other members of the are relatively small compared to the burden and expense that would be required to litigate their claims on an individual basis against Defendant, making it impracticable for Class members to individually seek redress for Defendant's wrongful conduct. Even if Class members could afford individual litigation, the court system could not. Individualized litigation would create a potential for inconsistent or contradictory judgments, and increase the delay and expense to all parties and the court system. By contrast, the class action device presents far fewer management difficulties and provides the

benefits of single adjudication, economies of scale, and comprehensive supervision by a single court.

297. This action is properly maintainable as a class action under Fed. R. Civ. P. 23(c)(4) in light of the nature and extent of the predominant common particular issues, exemplified in the common questions set forth above, generated by Defendant's consistent agreement, and consequent consistent policy, of promoting and facilitating the use of the Medications.

CAUSES OF ACTION

COUNT I
NEGLIGENCE

298. Plaintiffs adopt by reference all allegations contained in the paragraphs above, as if fully set forth in this Count.

299. The NFL's provision and administration of substances described herein violated the CSA's requirements governing the acquisition, storage, provision and administration of, and recordkeeping concerning, Schedule II, III and IV controlled substances.

300. The NFL violated the FDCA's requirements for prescriptions, warnings about known and possible side effects, and proper labeling, among other violations.

301. The NFL's provision and administration of Medications also violated state laws governing the acquisition, storage, and dispensation of prescription medications.

302. The NFL's provision and administration of Medications also violated state laws governing the recordkeeping mandated for the acquisition, storage and dispensation of prescription medications.

303. For example, the NFL violated the California Pharmacy Law, Calif. Bus. & Prof. Code § 4000, *et seq.* in a number of ways, including: (i) permitting the administration and provision of prescription medications by persons not properly authorized to do so, (ii) without valid

prescriptions or proper medical care providers' orders, evaluations, diagnoses, warnings and monitoring.

304. The NFL had a duty to conduct its business in a lawful manner and breached it. The NFL's violations of the various federal and state laws noted above constitutes negligence per se.

305. Finally, to the extent the NFL voluntarily undertook a duty apart from those identified above to ensure the proper recordkeeping, administration and distribution of Medications, it breached that duty.

306. The NFL's violation of the CSA, FDCA, and state laws and breach of its duties proximately caused Plaintiffs and the Class Members' currently-manifest and latent physical injuries, economic losses, emotional distress, pain and suffering and other losses, harms and damages.

307. The NFL's violations and breaches were necessary to create the volume of Medications necessary to implement the NFL's return to play Business Plan which proximately caused the Plaintiffs' and Class Members' injuries.

308. Plaintiffs and the Class Members' currently-manifest and latent physical injuries, economic losses, emotional distress, pain and suffering and other losses, harms and damages resulted from events and conditions that the CSA and FDCA, and applicable state laws, were designed to prevent.

309. Plaintiffs and the Class Members are within the class of persons for whose protection the CSA and FDCA, and applicable state laws, were adopted.

310. As a result of its violations of the CSA and FDCA, and of applicable state laws, the NFL is negligent and liable to Plaintiffs and the Class Members for the full measure of damages of all categories permissible under applicable law.

PRAYER FOR RELIEF

WHEREFORE, the Plaintiffs pray for judgment as follows:

a. Certify a class and appoint Plaintiffs and Class representatives and Plaintiffs' counsel as Class counsel;

b. Awarding Plaintiffs and the Class compensatory damages against the NFL;

c. Awarding Plaintiffs and the Class punitive damages against the NFL;

d. Awarding Plaintiffs and the Class such other relief as may be appropriate; and

e. Granting Plaintiffs and the Class their prejudgment interest, costs and attorneys' fees.

Dated: December 5, 2018

Respectfully Submitted,

/s/

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Attorneys for Plaintiffs Richard Dent, Jeremy Newberry, Roy Green, J.D. Hill, Keith Van Horne, Ron Stone, Ron Pritchard, James McMahon, and Marcellus Wiley

DEMAND FOR JURY TRIAL

Plaintiffs Richard Dent, Jeremy Newberry, Roy Green, J.D. Hill, Keith Van Horne, Ron Stone, Ron Pritchard, James McMahon, and Marcellus Wiley request a trial by jury on all issues for which they are entitled to a jury.

Dated: December 5, 2018

By /s/
William N. Sinclair
Silverman|Thompson|Slutkin|White|LLC

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

RICHARD DENT, JEREMY NEWBERRY, ROY GREEN, J.D. HILL, KEITH VAN HORNE, RON STONE, RON PRITCHARD, JAMES MCMAHON, MARCELLUS WILEY, and JONATHAN REX HADNOT, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

NATIONAL FOOTBALL LEAGUE, a New York unincorporated association,

Defendant.
_____/

No. C 14-02324 WHA

JUDGMENT

The Court's order granting defendant's motion to dismiss allowed plaintiffs to file a motion to amend their complaint by Noon on December 30, 2014. That time has passed. **FINAL JUDGMENT IS HEREBY ENTERED** in favor of defendant against plaintiffs.

The Clerk **SHALL CLOSE THE FILE**.

IT IS SO ORDERED.

Dated: December 31, 2014.

WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

RICHARD DENT, JEREMY NEWBERRY, ROY GREEN, J.D. HILL, KEITH VAN HORNE, RON STONE, RON PRITCHARD, JAMES MCMAHON, MARCELLUS WILEY, and JONATHAN REX HADNOT, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

NATIONAL FOOTBALL LEAGUE, a New York unincorporated association,

Defendant.
_____/

No. C 14-02324 WHA

ORDER RE MOTIONS TO DISMISS AND REQUESTS FOR JUDICIAL NOTICE

INTRODUCTION

In this putative class action alleging improper administration of pain medications to professional football players, defendant has filed two sets of motions to dismiss the operative complaint, based on (1) preemption under Section 301 of the Labor Management Relations Act; and (2) the statute of limitations and improper pleading. To the extent stated herein, the motion to dismiss under Section 301 is **GRANTED**. Defendant's other motion to dismiss is **DENIED AS MOOT**.

STATEMENT

The following well-pled facts are assumed to be true for purposes of the present motions. Defendant National Football League is an unincorporated association of 32 separately-owned

and independently-operated professional football "clubs" or teams across the country. Named plaintiffs are ten retired individuals who played for a number of those individual football teams at various points in time, some as early as 1969 and others as recently as 2012 (Second Amd. Compl. ¶¶ 23–49, 55). On May 20, 2014, those ten plaintiffs sued the NFL and are now on their second amended complaint.

Here is the nub of it. Since 1969, doctors and trainers from the individual clubs have allegedly supplied players with a consistent string of pain medications — including opioids, Toradol and other non-steroidal anti-inflammatory medications, local anesthetics, and combinations thereof — all in an effort to return players to the game, rather than allow them to rest and heal properly from serious, football-related injuries. The medications "were often administered without a prescription and with little regard for a player's medical history or potentially-fatal interactions with other medications," and were distributed in ways that violated federal laws (both criminal and civil) as well as the American Medical Association's Code of Ethics (*id.* ¶¶ 10–22, 63–122).

For example, while still playing football, plaintiffs "rarely, if ever, received written prescriptions" for their pain medications, which could come in either injection or pill form. "The bulk of their pills [were] not in bottles . . . but rather in small manila envelopes that often had no directions or labeling," and "NFL doctors and trainers" would then fail to disclose to plaintiffs the side effects and risks posed by such medication, instead rushing plaintiffs to return to the field (regardless of the injuries still suffered). The result now is that after years of taking such medication without proper disclosure about the medical side effects and risks, plaintiffs suffer from debilitating physical and mental heath issues, including nerve, knee, and elbow injuries that never healed properly, heart disease, renal failure, and drug addiction (*id.* ¶¶ 23–49, 242–47, 287).

The operative complaint seeks relief against the league, the NFL, not against the clubs. It asserts nine claims: (1) declaratory relief; (2) medical monitoring; (3) fraud; (4) fraudulent concealment; (5) negligent misrepresentation; (6) negligence *per se* in connection with the federal Controlled Substances Act, the federal Food, Drug, and Cosmetic Act, "state laws," and

ethical codes governing the acquisition, storage, dispensation, and record keeping of prescription medications; (7) loss of consortium on behalf of putative class members' spouses; (8) negligent hiring of medical personnel; and (9) negligent retention of medical personnel (*id.* ¶¶ 373–80).

Now, the NFL has filed two sets of motions to dismiss. *First*, the league argues that plaintiffs' negligence and fraud-based claims *i.e.*, Claims Three, Four, Five, Six, Eight, and Nine, are preempted by Section 301 of the Labor Management Relations Act, 29 U.S.C. 185(a). This motion also asserts that all remaining claims *i.e.*, Claims One, Two, and Seven, are derivative such that they too are preempted. *Second*, the league moves to dismiss the operative complaint as time-barred under the statute of limitations, for failure to plead fraud-based claims with sufficient particularity, and for failure to plead other claims adequately. Both sides also request judicial notice of various documents relating to medical studies, workers' compensation proceedings, arbitration matters, and other topics.

Following the hearing on November 6, 2014, the Court propounded a series of requests for additional briefing, including from the union (which is not a party herein). The Court thanks counsel for their prompt follow-up and responses.

ANALYSIS

1. JUDICIAL NOTICE.

Defendant appended the various collective-bargaining agreements as exhibits to its motion to dismiss (Curran Exhs. 1–13). Defendant also appended several player grievance letters to its brief. The Court then requested that both parties explain whether or not the Court could consult these agreements and grievance letters in ruling on defendant's Rule 12 motion. Both parties agreed that under FRE 201(b), the Court should judicially notice the agreements and letters (Dkt. Nos. 95, 97–98, 105). Accordingly, defendant's requests for judicial notice of Curran Exhibits 1–13 and Nash Exhibit A are **GRANTED.** Because this order need not consider the other materials for which the parties seek judicial notice, those requests are **DENIED AS MOOT**.

2. PREEMPTION AND SECTION 301 IN THE SUPREME COURT.

Unlike ordinary contracts, collective-bargaining agreements enjoy preemptive effect over state common law duties. Section 301 of the Labor Management Relations Act governs "[s]uits for violation of contracts between an employer and a labor organization." 29 U.S.C. 185(a). In enacting Section 301, Congress intended that the rights and duties created through collective-bargaining, involving as they do the collective strength of the unionized workers and their employer, should ordinarily trump common law remedies.

In *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 456 (1957), the Supreme Court concluded that Congress, through Section 301, had authorized federal courts to create a body of federal law for the enforcement of collective-bargaining agreements, "which the courts must fashion from the policy of our national labor laws."

In *Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 104 (1962), the Supreme Court concluded that "in enacting Section 301 Congress intended doctrines of federal labor law uniformly to prevail over inconsistent local rules." *Lucas Flour* described the need for strong enforcement of collective-bargaining agreements:

> The possibility that individual contract terms might have different meanings under state and federal law would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements. Because neither party could be certain of the rights which it had obtained or conceded, the process of negotiating an agreement would be made immeasurably more difficult by the necessity of trying of trying to formulate contract provisions in such a way as to contain the same meaning under two or more systems of law which might someday be invoked in enforcing the contract. Once the collective bargain was made, the possibility of conflicting substantive interpretation under competing legal systems would tend to stimulate and prolong disputes as to its interpretation.

In *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 220 (1985), the Supreme Court examined an employee's state law tort action against his employer for bad faith handling of disability-benefit payments due under a collective-bargaining agreement. The employee alleged that his employer and its insurance company breached a state law duty to act in good faith in paying disability benefits. *Allis-Chalmers* held that "when resolution of a state-law claim is substantially dependent upon analysis of the terms of an agreement made between the parties in a

labor contract, that claim must either be treated as a Section 301 claim, or dismissed as pre-empted by federal labor-contract law." A tort claim "inextricably intertwined with consideration of the terms of the labor contract" must be deemed preempted under Section 301. The Court found that the claims against the employer and the insurer were thus preempted under Section 301. Significantly, *Allis-Chalmers* went beyond preempting only claims in express conflict with a collective-bargaining agreement.

Lastly, in *International Brotherhood Of Electric Workers v. Hechler*, 481 U.S. 851, 859 (1987), the Supreme Court concluded that "we must determine if respondent's claim is sufficiently independent of the collective-bargaining agreement to withstand the pre-emptive force of Section 301." The Court determined that plaintiff's claim was not sufficiently independent. In assessing tort liability, "a court would have to ascertain, first, whether the collective-bargaining agreement in fact placed an implied duty of care on the union to ensure that Hechler was provided a safe workplace, and, second, the nature and scope of that duty, that is whether, and to what extent, the union's duty extended to the particular responsibilities alleged by respondent in her complaint. Thus, in this case, as in *Allis-Chalmers*, it is clear that 'questions of contract interpretation . . . underlie any finding of tort liability.'" *Id*. at 862 (internal citations omitted). Again, an express conflict between the claim asserted and the collective-bargaining agreement was not required.

In sum, Section 301 preempts state-law claims that are "founded directly on rights created by collective-bargaining agreements," as well as claims that are "substantially dependent on analysis of a collective-bargaining agreement."

On Section 301 preemption, our court of appeals has summarized the law as follows:

> If the plaintiff's claim cannot be resolved without interpreting the applicable CBA . . . it is preempted. Alternatively, if the claim may be litigated without reference to the rights and duties established in a CBA . . . it is not preempted. *The plaintiff's claim is the touchstone for this analysis; the need to interpret the CBA must inhere in the nature of the plaintiff's claim* . . . . A state law claim is not preempted under [Section] 301 *unless it necessarily requires the court to interpret an existing provision of a CBA that can reasonably be said to be relevant to the resolution of the dispute.*

Cramer v. Consolidated Freightways, Inc., 255 F.3d 683, 689–93 (9th Cir. 2001) (en banc) (emphasis added) (internal citations omitted). "A creative linkage between the subject matter of the claim and the wording of a CBA provision is insufficient; rather, the proffered interpretation argument must reach a reasonable level of credibility." *Id.* at 691–92.

3. NEGLIGENCE-BASED CLAIMS.

The essence of plaintiffs' claim for relief is that the individual clubs mistreated their players and the league was negligent in failing to intervene and stop their alleged mistreatment. Plaintiffs anchor this claim for relief in supposed common law duties of each of the various states whose law would apply and vaguely suggest that all such states would impose the same uniform duty on the league to oversee the clubs.

One problem is this: no decision in any state (including California) has ever held that a professional sports league owed such a duty to intervene and stop mistreatment by the league's independent clubs. During oral argument, plaintiffs' counsel repeatedly cited *Rowland v. Christian*, 69 Cal. 2d 108, 113 (1968), a California Supreme Court decision that recognized the existence of an individual's common law duty of reasonable care based on the foreseeability of harm (and a number of other considerations). But *Rowland* addressed those considerations to determine the liability of a land possessor, not the liability of an unincorporated association of independent clubs therein. There is simply no case law that has imposed upon a sports league a common law duty to police the health-and-safety treatment of players by the clubs.

Nevertheless, in assessing the Section 301 issue, this order accepts for the sake of argument that the asserted claims for relief would be recognized under the common law of at least California. That is, this order takes at face value the common law theories expressed in the operative complaint and then determines whether those claims for relief are preempted under Section 301.

A. In Evaluating the Negligence Claims, the Court Would Have to Consider the Positive Protections the NFL has Imposed on Clubs Via Collective Bargaining.

In evaluating any possible negligence by the NFL as alleged in the operative pleading, it would be necessary to take into account what the NFL has affirmatively done to address the problem, not just what it has not done.

The league has taken many steps to address the issue of player medical care by imposing on the clubs detailed provisions in numerous collective-bargaining agreements between the players' union and the NFL from 1968 onward. During the bargaining pursuant to the National Labor Relations Act, the players and the league imposed numerous duties upon the clubs for the protection of the players' health and safety. Through these CBAs, players' medical rights have steadily expanded. These provisions cover, among other things, the duties of individual clubs to hire doctors and trainers and to provide medical care and information to players. By way of examples, this order now marches through several provisions in chronological order:

The 1971 CBA imposed a requirement that the home team provide an ambulance (Curran Exh. 12 at Article XIX, Section 19.5) (1971):

> MEDICAL FACILITIES: The home team shall provide a physician and an ambulance at each game available to both teams.

The 1980 CBA imposed a process for club physicians to document expected player recovery time (Curran Exh. 13 at 12) (1980):

> DOCUMENTATION: All determinations of recovery time for major and minor injuries must be by the Club's medical staff and in accordance with the Club's medical standards. . . . The prognosis of the player's recovery time should be as precise as possible.

The 1982 CBA imposed a club requirement to have a board-certified orthopedic surgeon as one of the club physicians, to absorb the cost of doing so, and imposed further requirements regarding notice to players of injuries (Curran Exh. 5 at Article XXXI, Section 1) (1982):

> PLAYERS' RIGHTS TO MEDICAL CARE AND TREATMENT
>
> Section 1. Club Physician: Each Club will have a board-certified orthopedic surgeon as one of its Club physicians. The cost of

> medical services rendered by Club physicians will be the responsibility of the respective Clubs. If a Club physician advises a coach or other Club representative of a player's physical condition which adversely affects the player's performance or health, the physician will also advise the player.

The 1982 CBA imposed regulations on the clubs regarding player access to medical records (Curran Exh. 5 at Article XXXII, Section 2) (1982):

> MEDICAL RECORDS: Player may examine his medical and trainers' records in the possession of the Club or Club physician two times each year, once during the pre-season and again after the regular season.

The 1982 CBA imposed club requirements regarding chemical abuse and dependency (Curran Exh. 5 at Article XXXI, Section 7) (1982):

> TESTING: The Club physician may, upon reasonable cause, direct a player . . . for testing for chemical abuse or dependency problems.

The 1982 CBA imposed regulations on the clubs regarding the certification of trainers (Curran Exh. 5 at Article XXXI, Section 2) (1982):

> CLUB TRAINERS: All full-time head trainers and assistant trainers hired after the date of execution of this Agreement will be certified by the National Athletic Trainers Association. All part-time trainers must work under the direct supervision of a certified trainer.

The 1993 CBA imposed a duty on the clubs to advise the player in writing if a condition could be significantly aggravated by returning to the field (Curran Exh. 6 at Article XLIV, Section 1) (1993):

> If such condition could be significantly aggravated by continued performance, the physician will advise the player of such fact in writing before the player is again allowed to perform on-field activity.

The 1993 CBA imposed a right to medical care for injuries and placed the scope of such care in the hands of the club physicians (Curran Exh. 6, Appendix C, at ¶ 9) (1993) (emphasis added):

> INJURY: Unless this contract specifically provides otherwise, if Player is injured in the performance of his services under this contract and promptly reports such injury to the Club physician or trainer, then Player will receive such medical and hospital care during the term of this contract *as the Club physician may deem necessary* . . .

The 1993 CBA imposed obligations on the clubs relating to substance abuse (Curran Exh. 6 at Article XLIV, Section 6) (1993):

> SUBSTANCE ABUSE: [I]t is the responsibility of the parties to deter and detect substance abuse . . . and to offer programs of intervention, rehabilitation, and support players who have substance abuse problems.

The 2002 CBA provided a right for a player to receive a second medical opinion (Curran Exh. 9 at Article XLIV, Section 3) (2002):

> PLAYERS RIGHT TO A SECOND MEDICAL OPINION: A player will have the opportunity to obtain a second medical opinion.

The 2002 CBA imposed a requirement that players receive pre-season physicals from club physicians (Curran Exh. 9 at Article XLIV, Section 5) (2002):

> STANDARD MINIMUM PRE-SEASON PHYSICAL: Each player will undergo a standardized minimum pre-season physical examination . . . which will be conducted by the Club physician.

The 2011 CBA required the clubs to expand the menu of physician types they employed and required that any newly-hired physician have a certification in sports medicine (Curran Exh. 11 at Article 39, Section 1) (2011):

> (a) Medical Credentials. Each Club will have a board-certified orthopedic surgeon as one of its Club physicians, and all other physicians retained by a Club to treat players shall be board-certified in their field of medical expertise. Each Club will also have at least one board-certified internist, family medicine, or emergency medicine physician (non-operative sports medicine specialist). Any Club medical physician (internist, family medicine or emergency medicine) hired after the effective date of this Agreement must also have a Certification of Added Qualification (CAQ) in Sports Medicine; any head team physician (orthopedic or medical) hired after the effective date of this Agreement must have a CAQ in Sports Medicine; and any current team physician promoted to head team physician after the effective date of this Agreement has until February 2013 to obtain a CAQ in Sports Medicine or relinquish the position.

The 2011 CBA clarified, if it was not already clear, that club physicians must comply with all federal, state, and local requirements, including all ethical standards established by any applicable government and/or other authority that regulates the medical profession (Curran Exh. 11 at Article 39, Section 1(c)) (2011) (emphasis added):

> DOCTOR/PATIENT RELATIONSHIP:
>
> The cost of medical services rendered by Club physicians will be the responsibility of the respective Clubs, but each Club physician's primary duty in providing player medical care shall be not to the Club but instead to the player-patient. This duty shall include traditional physician/patient confidentiality requirements. *In addition, all Club physicians and medical personnel shall comply with all federal, state, and local requirements, including all ethical rules and standards established by any applicable government and/or other authority that regulates or governs the medical profession in the Club's city.* All Club physicians are required to disclose to a player any and all information about the player's physical condition that the physician may from time to time provide to a coach or other Club representative, whether or not such information affects the player's performance or health. If a Club physician advises a coach or other Club representative of a player's serious injury or career threatening physical condition which significantly affects the player's performance or health, the physician will also advise the player in writing. The player, after being advised of such serious injury or career-threatening physical condition, may request a copy of the Club physician's record from the examination in which such physical condition was diagnosed and/or a written explanation from the Club physician of the physical condition.

The 2011 CBA required all clubs to employ at least two full-time certified trainers and required all clubs to retain at least one certified physical therapist (Curran Exh. 11 at Article 39, Section 2) (2011):

> CLUB TRAINERS: All athletic trainers employed or retained by Clubs to provide services to players, including any part time athletic trainers, must be certified by the National Athletic Trainers Association and must have a degree from an accredited four-year college or university. Each Club must have at least two full-time athletic trainers. All part-time athletic trainers must work under the direct supervision of a certified athletic trainer. In addition, each Club shall be required to have at least one full time physical therapist who is certified as a specialist in physical therapy to assist players in the care and rehabilitation of their injuries.

The 2011 CBA required the league to maintain an electronic medical record system (Curran Exh. 11 at Article 40, Section 3) (2011):

> ELECTRONIC MEDICAL RECORD SYSTEM: The NFL shall develop and implement an online, 24-hour electronic medical record system within 24 months of the effective date of this Agreement or such longer period as the parties may agree.

As demonstrated by the scope and development of these provisions, this is not a situation in which the NFL has stood by and done nothing. The union and the league have bargained extensively over the subject of player medical care for decades. While these protections do not specifically call out the prescribing of drugs and painkillers, they address more generally medical care, player health, and recovery time, and proper administration of drugs can reasonably be deemed to fall under these more general protections. Put differently, the right to medical care established by the CBAs, moreover, presumably included and still includes proper medical care in accordance with professional standards — including for the administration of drugs and painkillers — or at least a fair question of interpretation in that regard is posed.

* * *

Under these circumstances, this order agrees with the NFL and holds that Section 301 preempts plaintiffs' negligence-based claims. In determining the extent to which the NFL was negligent in failing to curb medication abuse by the clubs, it would be essential to take into account the affirmative steps the NFL has taken to protect the health and safety of the players, including the administration of medicine. The NFL addressed the problem of adequate medical care for players in at least one important and effective way, *i.e.*, through a bargaining process that imposed uniform duties on all clubs — without diminution at the whim of individual state tort laws. Therefore, the NFL should at least be given credit, in any negligence equation, for the positive steps it has taken and imposed on the clubs via collective bargaining.

Plaintiffs' negligent hiring and negligent retention claims, for example, allege that the NFL had a duty to "hire and retain educationally well-qualified, medically-competent, professionally-objective and specifically-trained professionals not subject to any conflicts" (Second Amd. Compl. ¶ 388). The CBA addressed this duty by requiring each club to retain a "board-certified orthopedic surgeon." Additionally, the CBA required all full time trainers to be "certified by the National Athletic Trainers Association" (Curran Exh. 6 at Article XLIV, Section 1; Exh. 5 at Article XXXI, Section 2). Whether the NFL was negligent cannot be fairly determined without ascertaining the full scope of player benefits contained in these clauses. To determine if the NFL negligently hired and retained medical personnel, this Court would need to interpret what the NFL has already required in the various CBA provisions outlined above.

The same analysis applies to plaintiffs' claims for negligent misrepresentation and negligence per se. Plaintiffs state that the NFL had a "duty to protect the Class Members, and to disclose to them the dangers of Medications." Further, plaintiffs claim that the NFL had a duty to follow federal and state laws regarding medications and to "act with reasonable care toward the Class Members" (Second Amd. Compl. ¶¶ 355, 370–80, 386).

To determine whether the NFL breached these duties, we would need to consult, construe, and apply what was required by the CBA provision stating that if a "condition could be significantly aggravated by continued performance, the physician will advise the player of

such fact in writing before the player is again allowed to perform on-field activity." Other CBA provisions outlined above that would need consultation and interpretation provide for a player's right to a second medical opinion, access to medical records, access to medical facilities, and require that the "prognosis of the player's recovery time should be as precise as possible." (Curran Exh. 6 at Article XLIV, Section 1; Exh. 13 at 12). It is impossible to determine the scope of the NFL's duties in relation to misrepresentation of medical risks, and whether the NFL breached those duties, without reference to the CBA provisions outlined above.

In sum, in deciding whether the NFL has been negligent in policing the clubs and in failing to address medical mistreatment by the clubs, it would be necessary to consider the ways in which the NFL has indeed stepped forward and required proper medical care — which here prominently included imposing specific CBA medical duties on the clubs. Contrary to plaintiffs' arguments, the lengths the NFL has gone in imposing duties on the clubs to protect the health and safety of the players cannot be ignored in evaluating whether or not it has been careless.

* * *

To this, plaintiffs reply that the Court can analyze the NFL's duties separate and apart from the duties owed by the individual clubs and their medical personnel. In fact, plaintiffs state that they did not sue "teams, team doctors or trainers" and thus interpretation of CBA provisions relating to the individual clubs "are completely unnecessary for resolving Plaintiffs' state law claims against the league" (Opp. at 2, 9).

This is simply not true. The nub of plaintiffs' claims is that the NFL is responsible for, and acts through, the clubs' medical staffs. As described above, plaintiffs claim that the NFL owed a supervisory duty regarding the medical care of the players. To determine what the scope of this supervisory duty was, and whether the NFL breached it, the Court would need to determine, to repeat, what the NFL, through the CBAs, required of the individual clubs and club physicians. The NFL's overarching duty would then depend on the extent to which the various CBAs required the clubs to protect the players' medical interests. It would thus be impossible

for the Court to analyze whether the NFL acted negligently, and whether the NFL's conduct caused the players' injuries, without consulting the specific CBA provisions that cover the individual clubs' duties to the players.

B. In Light of the Many Health-and-Safety Duties Imposed at the Club Level, the Absence of any Express CBA Duty at the League Level Implies that the CBA Has Allocated Such Duties to the Clubs and Elected Not to Allocate Them to the League.

It is true, as the union points out, that the CBAs had no express provision (one way or another) as to any league duty to police the clubs' medical treatment of players. In that narrow sense, the CBAs do not conflict with the common law theories of the operative complaint. Nevertheless, because the CBAs expressly and repeatedly allocate so many health-and-safety duties to the clubs, the CBAs can fairly be interpreted, by implication, to negate any such duty at the league level. Even if this interpretation were ultimately rejected, it is a fair one and that is sufficient for Section 301 preemption.

Notably, the league has expressly — in other contexts — taken on a duty of oversight of the clubs. For example, the league oversees the discipline of players and the CBAs have outlined the process by which the Commissioner can veto player contracts. Moreover, the 2011 CBA provided for league regulation of club off-season workouts and also provided for an NFLPA Medical Director that is to have "a critical role in advising the NFLPA on health and safety issues." (Curran Exh. 5 at Article VIII; Exh. 7 at Article XIV, Section 6; Exh. 11 at Article 39, Section 3). In sum, the NFL and the union have bargained for ongoing league oversight in some areas — but have not done so in others.

Where health and safety are concerned, the CBAs have allocated specific responsibilities to the clubs — but not to the league. By implication, this is tantamount to an agreement that the league has no oversight responsibility on these subjects. It would be reasonable to place all responsibility at the club level, for that level is where the play-or-not-play decisions are made, where the medical records are kept, and where players have daily contact with doctors. This line of interpretation has a "reasonable level of credibility," *Cramer*, 255 F.3d at 692, and that alone is enough to trigger preemption.

C. Although Our Court of Appeals Has No Section 301 Decision on Point, the Prevailing Case Law Favors Preemption.

Turning back to the Section 301 case law, there is no published decision from our court of appeals on the issue of preemption and professional football players' medical care. *Hendy v. Losse*, No. CV 88 1802, 1991 WL 17230, at *2 (9th Cir. 1991), though relevant, may not be considered, since it is a pre-2007 decision (CTA9 Rule 36-3(a)–(b)). Counsel should not have cited it.

This order finds instructive several out-of-circuit decisions. In *Williams v. National Football League*, 582 F.3d 863, 870–81 (8th Cir. 2009), current football players sued the NFL for fraud, negligence, and negligent misrepresentation (among other claims), after the players had tested positive for a banned substance in dietary supplements and were suspended thereafter. The essence of those claims was that the NFL owed "a common duty," separate from the CBAs, to provide the players "[an] ingredient-specific warning" for the dietary supplements. The Eighth Circuit disagreed, explaining (emphasis added) (internal citations omitted):

> However, whether the NFL . . . owed the Players a duty to provide such a warning *cannot be determined without examining the parties' legal relationship and expectations as established by the CBA and the Policy*. Thus, the breach of fiduciary duty, negligence, and gross negligence claims are "inextricably intertwined with consideration of the terms of the [Policy]." Because the claims "relating to what the parties to a labor agreement agreed . . . must be resolved by reference to uniform federal law," . . . they are preempted by [S]ection 301.

Likewise, in *Stringer v. National Football League*, 474 F. Supp. 2d 894, 898–99, 910–11 (S.D. Ohio 2007) (Judge John David Holschuh), a football player died from heat exhaustion during his team's summer training camp. Thereafter, his widow brought negligence-based claims against the NFL and others, alleging that the league had negligently republished "Hot Weather Guidelines" that had been in effect at the time of the player's death. *Stringer* held that this allegation was "inextricably intertwined with certain key provisions of the CBA," because "[w]hile the standard of care remains constant, the degree of care varie[d] with the facts and circumstances surrounding each particular case," including the "pre-existing

contractual duties imposed by the CBA on the individual NFL clubs concerning the general health and safety of the NFL players." In particular, *Stringer* pointed to provisions of the CBAs that addressed certification of individual teams' trainers and duties imposed on team physicians, explaining that resolution of the negligence-based claims was substantially dependent on such provisions "in determining the degree of care owed by the NFL and what was reasonable under the circumstances."

So too in *Duerson v. National Football League, Inc.*, No. 12 C 2513, 2012 WL 1658353, at *3–4 (N.D. Ill. May 11, 2012) (Judge James F. Holderman). There, a former football player committed suicide as a result of brain damage incurred during his NFL career. His estate sued the NFL for negligently failing to educate players about the risks of concussions. In its defense, the NFL pointed to a 1993 CBA provision that required team physicians to advise a player in writing about "significantly aggravated" physical conditions (one of the same collective-bargaining provisions at issue here). The district court concluded that if the player's team had such a duty to warn him about his concussive brain trauma as being "significantly aggravated," "it would be one factor tending to show that the NFL's alleged failure to take action to protect [the player] from concussive brain trauma was reasonable." In other words, determining the meaning of the CBAs was "necessary to resolve [the player's] negligence claim," because "[t]he NFL could . . . reasonably exercise a lower standard of care in that area itself" if "[a] court could plausibly interpret [the CBAs] to impose a duty on the NFL's clubs to monitor a player's health and fitness to continue to play football."

Finally, in *Smith v. National Football League Players Association*, No. 14 C 10559, 2014 WL 6776306 at *6–8 (E.D. Mo. Dec. 2, 2014) (Judge Ernest Webber), a putative class of retired players sued the NFLPA, asserting several fraud and negligence based claims relating to the union's treatment of concussions. Plaintiffs claimed the union negligently failed to research ways to prevent or mitigate brain trauma and fraudulently concealed concussion related information from the players. *Smith* acknowledged that the CBA did "not explicitly say the NFLPA has a duty to inform its members on the risks and consequences of head injuries."

Despite this, in assessing the scope of the union's duties in relation to plaintiffs' negligence and fraud claims, *Smith* found that "interpretation of the CBA is necessary." Furthermore, *Smith* concluded that "[t]he fact Plaintiffs are now retirees does not preclude preemption of claims based on events which occurred while Plaintiffs were members of the bargaining unit."

D. The Remaining Points Plaintiffs Raise Are Not Persuasive.

To the foregoing case law, plaintiffs respond as follows. *First*, plaintiffs say that *Williams*, *Stringer*, *Duerson*, and *Smith* contradict our court of appeals' decision in *Balcorta v. Twentieth Century-Fox Film Corp.*, 208 F.3d 1102, 1108–11 (9th Cir. 2000). Not true. *Balcorta* found no Section 301 preemption applicable because the plaintiff's statutory claims — for payments deemed late under a state labor statute — required resolution of factual issues under that statute, and not interpretation of any provision of the CBA therein. In comparison, this order finds that it would be necessary to interpret the CBAs' provisions on medical care to determine the NFL's own supposed negligence. *Cramer*, 255 F.3d at 693.

Second, plaintiffs reply that their claims are based on illegal conduct. This, however, misunderstands the Supreme Court's holding on this issue of illegality. In *Allis-Chalmers*, 471 U.S. at 211–12, the Supreme Court stated the following in the context of labor rights (emphasis added):

> Section 301 on its face says nothing about the substance of what private parties may agree to in a labor contract. Nor is there any suggestion that Congress, in adopting [Section] 301, wished to give the substantive provisions of private agreements the force of federal law, ousting any inconsistent state regulation. Such a rule of law would delegate to Unions and Unionized employers the power to exempt themselves from whatever state labor standards they disfavored. *Clearly,* [*Section*] *301 does not grant the parties to a collective-bargaining agreement the ability to contract for what is illegal under state law. In extending the pre-emptive effect of* [*Section*] *301 beyond suits for breach of contract, it would be inconsistent with congressional intent under that section to preempt state rules that proscribe conduct, or establish rights and obligations, independent of a labor contract*.

Accordingly, in *Cramer*, 255 F.3d at 685–88, our court of appeals recognized that CBAs touching on drug use and surveillance videotapes did not preempt an employer's "surreptitious"

video camera surveillance in employee bathrooms. The plaintiffs there had brought a *state statutory claim* for invasion of privacy. The resolution of such a statutory claim required no interpretation of any CBA in that case. So too in *Burnside v. Kiewit Pacific Corp.*, 491 F.3d 1053, 1071 (9th Cir. 2007), in which Judge Marsha Berzon wrote that employees' *state statutory claims* to be compensated for compulsory round-trip travel required no interpretation of any CBA.

To be sure, the operative complaint here alleges violations of federal and state statutes — but only as an antecedent and predicate for follow-on *state common law claims*. No right of action is allowed or asserted under the statutes themselves. Those statutes creep into our picture only as a step in an ordinary negligence theory, *i.e.* the clubs violated the federal statutes (allegedly) and the league was negligent (allegedly) in failing to detect and right it.

Third, plaintiffs contend that they cannot grieve and arbitrate their claims against the NFL through the procedures set forth under the CBAs because as retired players, plaintiffs are no longer part of the bargaining unit and are no longer subject to the CBA, which reportedly covers "only" future and current players (Br. 2). This order, however, holds that plaintiffs' retiree status is not a bar to the grievance procedures. On this issue, the union's letter has explained that "the current CBA and former CBAs have included various provisions negotiated on behalf of current and future players that continue to benefit those players after they retire from the NFL," such as provisions on retirement plans or termination pay (Dkt. No. 92 at 1–2). Accordingly, "*a player who has retired from the NFL may initiate and prosecute a grievance under the CBA if the retired player has a cognizable claim to grieve* . . . and the grievance satisfies the required limitations period," at least in the union's view (*id.* at 2) (emphasis added). In fact, former players in other cases have been able to arbitrate their grievances against the NFL or individual clubs, notwithstanding their prior retirement from the league (*see, e.g.*, Curran Exh. 3 at Article X; Exh. 11 at Article 43, Section 2). *See also Matthews v. National Football League Management Council*, 688 F.3d 1107, 1109–10 (9th Cir. 2012); *and Givens v.*

Tennessee Football, Inc., 684 F. Supp. 2d 985, 991 (M.D. Tenn. 2010) (Judge Todd J. Campbell).

Moreover, the NFL conceded at oral argument that plaintiffs' status as retirees does not affect their ability to grieve claims under the CBA. The NFL's counsel stated (Tr. 15):

> As a matter of fundamental labor law, parties who are subject to a bargaining unit and a collective bargaining agreement have rights and they retain those rights after retirement. The easiest example is the plaintiffs here all have numerous rights, even today, under the collective bargaining agreement for certain retirement benefits. There's retirement plans. There are even disability benefits that we've cited in the CBA that covers the kinds of injuries that they're complaining about here. Those benefits and those rights don't go away simply because it's either –- that they retire, and the law is quite clear on that.

What is more, the NFL has more recently conceded herein that the retired players likely had grievable claims if the allegations in the complaint are true. In its supplemental brief, the league stated that if the players' allegations are true, they "could have been grieved under several 'longstanding' CBA provisions." The NFL pointed to many of the CBA provisions outlined above, which provide for the qualifications of club physicians, procedures for treating injury, and requirements for informing players of the risks of continued performance (Dkt. No. 103). The league also provided examples of specific grievances players filed in the past, recounting many of the same allegations the players have put forth in this case. In fact, named plaintiff Richard Dent filed a grievance against the San Francisco 49ers in 1995, alleging many of the same abuses plaintiffs allege here. Dent claimed the 49ers failed to warn him of the risks of returning to the field and sent him back to play with a "clearly improper purpose." Dent further alleged that the 49ers did not provide "written notification of the risk inherent at that time by continued performance" (Nash Exh. A at 1–2).

To be clear, preemption does not require that the preempted state law claim be replaced by an analogue claim in the collective-bargaining agreement. *See Caterpillar Inc. v. Williams*, 482 U.S. 386, 391 n.4 (1987). Nevertheless, the types of claims asserted in the operative complaint are grievable in important respects under the various CBAs.

Lastly, this order addresses the gap period between applicable CBAs. The NFL has always operated under a CBA, with two exceptions: (1) from August 31, 1987 to March 29, 1993, following the expiration of the 1982 CBA and prior to the enactment of the 1993 CBA; and (2) from March 11, 2011 to August 4, 2011 (Curran Exhs. 1–11).

The NFL argues that this does not affect its Section 301 preemption claim because "a CBA was in effect during at least a portion of the time during which all ten Plaintiffs played." Furthermore, defendant adds (Br. n. 1):

> Because Plaintiffs' claims allege duties and breaches for the entirety of their careers, the fact that "the CBAs were in effect during at least some of the events alleged in the complaint" is sufficient to require preemption. *See Duerson v. National Football League*, Inc., No. 12 C 2513, 2012 WL 1658353, at *3 (N.D. Ill. May 11, 2012); *see also Sherwin v. Indianapolis Colts, Inc.*, 752 F. Supp. 1172, 1174 n.2 (N.D.N.Y. 1990) (finding claim related to player medical care in 1988 preempted because parties continued to operate under terms and conditions of expired CBA).

Plaintiffs did not respond to this issue in any of their briefing. In fact, plaintiffs' counsel conceded that this was not a relevant issue at oral argument, stating (Tr. 13–14):

> There was a period, I believe it was between 1998 and 2003, when there was no agreement. I might have those years wrong. But the NFL has put it as, I think, their second footnote in their brief about when there was a gap year because they use it to make the point that, well, at least at some point all of the players were under a CBA. We don't have any quarrel with that.

Based on the foregoing, this order finds that the gap does not affect Section 301 preemption.

As such, this order holds that Claims Five, Six, Eight, and Nine are preempted by Section 301. The motion to dismiss those claims is **GRANTED**.

4. FRAUD-BASED CLAIMS.

The NFL further argues that Section 301 preempts plaintiffs' fraud-based claims — *i.e.*, Claims Three and Four for fraud and fraudulent concealment — regarding the league's reported concealment of the pain medications' side effects and risks.

Without repeating the discussion above, this order finds that the same arguments regarding the necessity of interpreting the CBAs applies to both fraud-based claims here. In *Williams*, preemption applied to the players' claims of fraud and constructive fraud because the players "cannot demonstrate the requisite reasonable reliance to prevail on their claims without resorting to the CBA and the Policy." *Williams* explained that "the question of whether the Players can show that they reasonably relied on the lack of a warning that [the dietary supplements] contained bumetanide cannot be ascertained apart from the terms of the Policy, specifically section eight, entitled 'Masking Agents and Supplements' and Appendix G, entitled 'Supplements.'" So too here. It would be necessary to interpret the CBA provisions on the disclosure of medical information to determine whether plaintiffs reasonably relied on the alleged lack of proper disclosure by the NFL (Curran Exh. 6 at Article XLIV, Section 1; Exh. 13 at Article XVII).

The same reasoning also applies to the fraudulent-concealment claim. To resolve what duty the NFL owed to players in disclosing information about pain medication, interpretation of the CBAs would be required to determine the duty of care owed by individual clubs' physicians and trainers in disclosing information about the pain medications.

Accordingly, this order holds that Claims Three and Four are preempted by Section 301. The motion to dismiss those claims is therefore **GRANTED**.

5. REMAINING CLAIMS.

All that remains are Claims One, Two, and Seven for declaratory relief, medical monitoring, and loss of consortium on behalf of putative class members' spouses. These claims are derivative of the ones addressed above and fail for the same reason — Section 301.

CONCLUSION

In ruling against the novel claims asserted herein, this order does not minimize the underlying societal issue. In such a rough-and-tumble sport as professional football, player injuries loom as a serious and inevitable evil. Proper care of these injuries is likewise a

paramount need. The main point of this order is that the league has addressed these serious concerns in a serious way — by imposing duties on the clubs via collective bargaining and placing a long line of health-and-safety duties on the team owners themselves. These benefits may not have been perfect but they have been uniform across all clubs and not left to the vagaries of state common law. They are backed up by the enforcement power of the union itself and the players' right to enforce these benefits. Given the regime in place after decades of collective bargaining over the scope of these duties, it would be impossible to fashion and to apply new and supplemental state common law duties on the league without taking into account the adequacy and scope of the CBA duties already set in place. That being so, plaintiffs' common law claims are preempted by Section 301 of the Labor Management Relations Act of 1947. The motion to dismiss all of plaintiffs' claims based on preemption grounds under Section 301 is **GRANTED**. The NFL's other motion to dismiss is **DENIED AS MOOT**.

Plaintiffs may have until **DECEMBER 30, 2014, AT NOON**, to file a motion for leave to amend their claims, noticed on the normal 35-day calendar. A proposed amended complaint must be appended to any such motion. Plaintiffs must plead their best case. Any such motion should clearly explain how the amended complaint cures the deficiencies identified herein, and should include as an exhibit a redlined or highlighted version identifying all changes. If counsel prefer to stand on the present pleading for appeal purposes, judgment will be entered, the case will be closed, and an appeal may proceed.

IT IS SO ORDERED.

Dated: December 17, 2014.

WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE

United States District Court
For the Northern District of California

ADRMOP,APPEAL,CLOSED,REFSET-JCS

ER 266

U.S. District Court
California Northern District (San Francisco)
CIVIL DOCKET FOR CASE #: 3:14-cv-02324-WHA

Richard Dent, et al v. National Football League
Assigned to: Hon. William Alsup
Referred to: Magistrate Judge Joseph C. Spero (Settlement)
Relate Case Case: 3:16-cv-01030-WHA
Case in other court: .
9th Circuit, 19-16017
Cause: 28:1332 Diversity-Personal Injury

Date Filed: 05/20/2014
Date Terminated: 12/31/2014
Jury Demand: Plaintiff
Nature of Suit: 360 P.I.: Other
Jurisdiction: Diversity

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Date Filed	#	Docket Text
05/20/2014	1	CLASS ACTION COMPLAINT (Demand for Jury Trial) (No Process) against National Football League (Filing fee $400, receipt number 0971-8629427). Filed by Ron Stone, James McMahon, JD Hill, Richard Dent, Roy Green, Ron Pritchard, Jeremy Newberry, Keith Van Horne. (Attachments: # 1 Civil Cover Sheet)(Sinclair, William) (Filed on 5/20/2014) Modified on 5/20/2014 (cjlS, COURT STAFF). (Entered: 05/20/2014)
05/20/2014	2	Case assigned to Magistrate Judge Kandis A. Westmore. Counsel for plaintiff or the removing party is responsible for serving the Complaint or Notice of Removal, Summons and the assigned judge's standing orders and all other new case documents upon the opposing parties. For information, visit *E-Filing A New Civil Case* at http://cand.uscourts.gov/ecf/caseopening. Standing orders can be downloaded from the court's web page at www.cand.uscourts.gov/judges. Upon receipt, the summons will be issued and returned electronically. Counsel is required to send chambers a copy of the initiating documents pursuant to L.R. 5-1(e)(7). A scheduling order will be sent by Notice of Electronic Filing (NEF) within two business days. (bw, COURT STAFF) (Filed on 5/20/2014) (Entered: 05/20/2014)
05/20/2014	3	Certificate of Interested Entities by Richard Dent, Roy Green, JD Hill, James McMahon, Jeremy Newberry, Ron Pritchard, Ron Stone, Keith Van Horne (Sinclair, William) (Filed on 5/20/2014) (Entered: 05/20/2014)
05/20/2014	4	**Initial Case Management Scheduling Order with ADR Deadlines: Case Management Statement due by 8/12/2014. Case Management Conference set for 8/19/2014 01:30 PM in Courtroom 4, 3rd Floor, Oakland. (cjlS, COURT STAFF) (Filed on 5/20/2014) (Entered: 05/20/2014)**
06/04/2014	5	Amended Complaint Demand for Jury Trial Class Action against National Football League. Filed by Ron Stone, Roy Green, Ron Pritchard, Jeremy Newberry, James McMahon, Richard Dent, JD Hill, Keith Van Horne, Marcellus Wiley. (Attachments: # 1 Summons)(Sinclair, William) (Filed on 6/4/2014) Modified on 6/5/2014 (cjlS, COURT STAFF). (Entered: 06/04/2014)
06/04/2014	6	MOTION for leave to appear in Pro Hac Vice *Stephen G. Grygiel* (Filing fee $ 305, receipt number 0971-8666938.) filed by Richard Dent, Roy Green, JD Hill, James McMahon, Jeremy Newberry, Ron Pritchard, Ron Stone, Keith Van Horne, Marcellus Wiley. (Sinclair, William) (Filed on 6/4/2014) (Entered: 06/04/2014)
06/04/2014	7	MOTION for leave to appear in Pro Hac Vice *Joseph F. Murphy Jr.* (Filing fee $ 305, receipt number 0971-8666998.) filed by Richard Dent, Roy Green, JD Hill, James

		McMahon, Jeremy Newberry, Ron Pritchard, Ron Stone, Keith Van Horne, Marcellus Wiley. (Sinclair, William) (Filed on 6/4/2014) (Entered: 06/04/2014)
06/04/2014	8	MOTION for leave to appear in Pro Hac Vice *Steven D. Silverman* (Filing fee $ 305, receipt number 0971-8667006.) filed by Richard Dent, Roy Green, JD Hill, James McMahon, Jeremy Newberry, Ron Pritchard, Ron Stone, Keith Van Horne, Marcellus Wiley. (Sinclair, William) (Filed on 6/4/2014) (Entered: 06/04/2014)
06/04/2014	9	MOTION for leave to appear in Pro Hac Vice *Andrew G. Slutkin* (Filing fee $ 305, receipt number 0971-8667012.) filed by Richard Dent, Roy Green, JD Hill, James McMahon, Jeremy Newberry, Ron Pritchard, Ron Stone, Keith Van Horne, Marcellus Wiley. (Sinclair, William) (Filed on 6/4/2014) (Entered: 06/04/2014)
06/05/2014	10	Summons Issued as to National Football League. (cjlS, COURT STAFF) (Filed on 6/5/2014) (Entered: 06/05/2014)
06/10/2014	11	**Order by Magistrate Judge Kandis A. Westmore granting 6 Motion for Pro Hac Vice Re: Stephen Grypiel. (kawlc2S, COURT STAFF) (Filed on 6/10/2014) Modified on 6/11/2014 (cjlS, COURT STAFF). (Entered: 06/10/2014)**
06/10/2014	12	**Order by Magistrate Judge Kandis A. Westmore granting 7 Motion for Pro Hac Vice Re: Joseph F. Murphy, Jr.(kawlc2S, COURT STAFF) (Filed on 6/10/2014) Modified on 6/11/2014 (cjlS, COURT STAFF). (Entered: 06/10/2014)**
06/10/2014	13	**Order by Magistrate Judge Kandis A. Westmore granting 8 Motion for Pro Hac Vice Re: Steven D. Silverman.(kawlc2S, COURT STAFF) (Filed on 6/10/2014) Modified on 6/11/2014 (cjlS, COURT STAFF). (Entered: 06/10/2014)**
06/10/2014	14	**Order by Magistrate Judge Kandis A. Westmore granting 9 Motion for Pro Hac Vice Re: Andrew G. Slutkin. (kawlc2S, COURT STAFF) (Filed on 6/10/2014) Modified on 6/11/2014 (cjlS, COURT STAFF). (Entered: 06/10/2014)**
06/18/2014	15	CLERK'S NOTICE Re: Consent or Declination: Plaintiffs shall file a consent or declination to proceed before a magistrate judge within 14 days of this notice. **This is a text only entry. There is no document associated with this entry** (kc, COURT STAFF) (Filed on 6/18/2014) (Entered: 06/18/2014)
06/20/2014	16	MOTION for leave to appear in Pro Hac Vice Re: Phillip J. Closius (Filing fee $305, receipt number 0971-8711045.) filed by Richard Dent, Roy Green, JD Hill, James McMahon, Jeremy Newberry, Ron Pritchard, Ron Stone, Keith Van Horne, Marcellus Wiley. (Sinclair, William) (Filed on 6/20/2014) Modified on 6/23/2014 (cjlS, COURT STAFF). (Entered: 06/20/2014)
06/25/2014	17	**Order by Magistrate Judge Kandis A. Westmore granting 16 Motion for Pro Hac Vice Re: Phillip J. Colsius. (kawlc2S, COURT STAFF) (Filed on 6/25/2014) Modified on 6/26/2014 (cjlS, COURT STAFF). (Entered: 06/25/2014)**
06/26/2014	18	CLERKS NOTICE re: Failure to Register as an E-Filer. (Attachments: # 1 Certificate/Proof of Service) (cjlS, COURT STAFF) (Filed on 6/26/2014) (Entered: 06/26/2014)
07/02/2014	19	CONSENT/DECLINATION to Proceed Before a US Magistrate Judge by Richard Dent, Roy Green, JD Hill, James McMahon, Jeremy Newberry, Ron Pritchard, Ron Stone, Keith Van Horne, Marcellus Wiley.. (Sinclair, William) (Filed on 7/2/2014) (Entered: 07/02/2014)
07/03/2014	20	CLERK'S NOTICE OF IMPENDING REASSIGNMENT TO A U.S. DISTRICT COURT JUDGE: The Clerk of this Court will now randomly reassign this case to a District Judge because either (1) a party has not consented to the jurisdiction of a

		Magistrate Judge, or (2) time is of the essence in deciding a pending judicial action for which the necessary consents to Magistrate Judge jurisdiction have not been secured. You will be informed by separate notice of the district judge to whom this case is reassigned. ALL HEARING DATES PRESENTLY SCHEDULED BEFORE THE CURRENT MAGISTRATE JUDGE ARE VACATED AND SHOULD BE RE-NOTICED FOR HEARING BEFORE THE JUDGE TO WHOM THIS CASE IS REASSIGNED. *This is a text only docket entry; there is no document associated with this notice.* (sisS, COURT STAFF) (Filed on 7/3/2014) (Entered: 07/03/2014)
07/07/2014	21	**ORDER REASSIGNING CASE. Case reassigned to Judge William Alsup for all further proceedings. Magistrate Judge Kandis A. Westmore no longer assigned to the case. Signed by Executive Committee on 7/7/14. (kcS, COURT STAFF) (Filed on 7/7/2014) (Entered: 07/07/2014)**
07/07/2014	22	**NOTICE RE FACTORS TO BE EVALUATED FOR ANY PROPOSED CLASS SETTLEMENT. Signed by Judge Alsup on 7/7/2014. (whalc2, COURT STAFF) (Filed on 7/7/2014). (Entered: 07/07/2014)**
07/07/2014	23	CLERK'S NOTICE SCHEDULING INITIAL CASE MANAGEMENT CONFERENCE ON REASSIGNMENT. Case Management Statement due by 8/14/2014. Initial Case Management Conference set for 8/21/2014 at 11:00 AM in Courtroom 8, 19th Floor, San Francisco. (Attachments: # 1 Standing Order for All Judges of the Northern District) (wsn, COURT STAFF) (Filed on 7/7/2014) (Entered: 07/07/2014)
07/07/2014	24	**SUPPLEMENTAL ORDER TO ORDER SETTING INITIAL CASE MANAGEMENT CONFERENCE re 23 Clerks Notice. Signed by Judge William Alsup on October 16, 2012. (wsn, COURT STAFF) (Filed on 7/7/2014) (Entered: 07/07/2014)**
07/12/2014	25	WAIVER OF SERVICE Returned Executed filed by Ron Stone, Roy Green, Ron Pritchard, Jeremy Newberry, James McMahon, Richard Dent, JD Hill, Marcellus Wiley, Keith Van Horne. Service waived by National Football League waiver sent on 7/11/2014, answer due 9/9/2014. (Sinclair, William) (Filed on 7/12/2014) (Entered: 07/12/2014)
07/29/2014	26	NOTICE of Appearance by Allen Ruby (Ruby, Allen) (Filed on 7/29/2014) (Entered: 07/29/2014)
07/29/2014	27	ADR Certification (ADR L.R. 3-5 b) of discussion of ADR options (Ruby, Allen) (Filed on 7/29/2014) (Entered: 07/29/2014)
07/29/2014	28	NOTICE of Appearance by Timothy Alan Miller (Miller, Timothy) (Filed on 7/29/2014) (Entered: 07/29/2014)
07/29/2014	29	NOTICE of Appearance by Jack Patrick DiCanio (DiCanio, Jack) (Filed on 7/29/2014) (Entered: 07/29/2014)
07/30/2014	30	ADR Certification (ADR L.R. 3-5 b) of discussion of ADR options (Attachments: # 1 Certificate/Proof of Service)(Sinclair, William) (Filed on 7/30/2014) (Entered: 07/30/2014)
08/13/2014	31	Certificate of Interested Entities by National Football League (Ruby, Allen) (Filed on 8/13/2014) (Entered: 08/13/2014)
08/13/2014	32	STIPULATION WITH PROPOSED ORDER *Stipulated Protective Order* filed by National Football League. (Ruby, Allen) (Filed on 8/13/2014) (Entered: 08/13/2014)
08/14/2014	33	**ORDER APPROVING 32 STIPULATED PROTECTIVE ORDER SUBJECT TO STATED CONDITIONS.(whalc2, COURT STAFF) (Filed on 8/14/2014). (Entered: 08/14/2014)**

08/14/2014	34	STIPULATION WITH PROPOSED ORDER *to Extend Page Limits for Joint Case Mangement Statement* filed by National Football League. (Ruby, Allen) (Filed on 8/14/2014) (Entered: 08/14/2014)
08/14/2014	35	JOINT CASE MANAGEMENT STATEMENT filed by National Football League. (Attachments: # 1 Exhibit A, # 2 Exhibit B)(Ruby, Allen) (Filed on 8/14/2014) (Entered: 08/14/2014)
08/14/2014	36	**ORDER GRANTING 34 STIPULATION TO EXTEND PAGE LIMITS FOR JOINT CASE MANAGEMENT STATEMENT.(whalc2, COURT STAFF) (Filed on 8/14/2014). (Entered: 08/14/2014)**
08/18/2014	37	MOTION for leave to appear in Pro Hac Vice *of Stuart A. Davidson* (Filing fee $ 305, receipt number 0971-8851737.) filed by Richard Dent, Roy Green, JD Hill, James McMahon, Jeremy Newberry, Ron Pritchard, Ron Stone, Keith Van Horne, Marcellus Wiley. (Attachments: # 1 Exhibit Certificate of Good Standing)(Davidson, Stuart) (Filed on 8/18/2014) (Entered: 08/18/2014)
08/18/2014	38	MOTION for leave to appear in Pro Hac Vice - *MARK J. DEARMAN* - (Filing fee $ 305, receipt number 0971-8851915.) filed by Richard Dent. (Attachments: # 1 Exhibit Certificate of Good Standing)(Dearman, Mark) (Filed on 8/18/2014) (Entered: 08/18/2014)
08/18/2014	39	MOTION for leave to appear in Pro Hac Vice *of Kathleen B. Douglas* (Filing fee $ 305, receipt number 0971-8851965.) filed by Richard Dent, Roy Green, JD Hill, James McMahon, Jeremy Newberry, Ron Pritchard, Ron Stone, Keith Van Horne, Marcellus Wiley. (Attachments: # 1 Exhibit Certificate of Good Standing)(Douglas, Kathleen) (Filed on 8/18/2014) (Entered: 08/18/2014)
08/18/2014	40	MOTION for leave to appear in Pro Hac Vice - *Mark J. Dearman* - (Filing fee $ 305, receipt number 0971-8851915.) Filing fee previously paid on 8/18/2014 filed by Roy Green, JD Hill, James McMahon, Jeremy Newberry, Ron Pritchard, Ron Stone, Keith Van Horne, Marcellus Wiley. (Attachments: # 1 Exhibit Certificate of Good Standing) (Dearman, Mark) (Filed on 8/18/2014) (Entered: 08/18/2014)
08/18/2014	41	MOTION for leave to appear in Pro Hac Vice (Filing fee $ 305, receipt number 0971-8852144.) filed by Richard Dent, Roy Green, JD Hill, James McMahon, Jeremy Newberry, Ron Pritchard, Ron Stone, Keith Van Horne, Marcellus Wiley. (Attachments: # 1 Certificate/Proof of Service Certificate of Good Standing)(Arno, Janine) (Filed on 8/18/2014) (Entered: 08/18/2014)
08/18/2014	42	Amended MOTION for leave to appear in Pro Hac Vice *of Stuart A. Davidson* (Filing fee $ 305, receipt number 0971-8851737.) Filing fee previously paid on 08/18/14 filed by Richard Dent, Roy Green, JD Hill, James McMahon, Jeremy Newberry, Ron Pritchard, Ron Stone, Keith Van Horne, Marcellus Wiley. (Attachments: # 1 Exhibit Certificate of Good Standing)(Davidson, Stuart) (Filed on 8/18/2014) (Entered: 08/18/2014)
08/18/2014	43	Amended MOTION for leave to appear in Pro Hac Vice - *Mark J. Dearman* - (Filing fee $ 305, receipt number 0971-8851915.) Filing fee previously paid on 8/18/14 filed by Richard Dent, Roy Green, JD Hill, James McMahon, Jeremy Newberry, Ron Pritchard, Ron Stone, Keith Van Horne, Marcellus Wiley. (Attachments: # 1 Exhibit Certificate of Good Standing)(Dearman, Mark) (Filed on 8/18/2014) (Entered: 08/18/2014)
08/19/2014	44	**ORDER GRANTING 42 AMENDED APPLICATION FOR ADMISSION OF ATTORNEY PRO HAC VICE.(whalc2, COURT STAFF) (Filed on 8/19/2014). (Entered: 08/19/2014)**
08/19/2014	45	**ORDER GRANTING 43 AMENDED APPLICATION FOR ADMISSION OF**

		ATTORNEY PRO HAC VICE.(whalc2, COURT STAFF) (Filed on 8/19/2014). (Entered: 08/19/2014) ER 283
08/21/2014	47	Minute Entry: Initial Case Management Conference held on 8/21/2014 before Judge William Alsup (Date Filed: 8/21/2014). Named plaintiff Jeremy Newberry was present. CMO was adopted with some modifications. (Court Reporter Lydia Zinn.) (dt, COURT STAFF) (Date Filed: 8/21/2014) (Entered: 08/22/2014)
08/22/2014	46	**CASE MANAGEMENT SCHEDULING ORDER: ORDER REFERRING CASE to Magistrate Judge Joseph C. Spero for Mediation/Settlement. All Rule 12 motions due by 9/25/2014. Motion for class certification due by 3/26/2015. Discovery due by 12/11/2015. Jury Trial set for 4/11/2016 07:30 AM in Courtroom 8, 19th Floor, San Francisco before Hon. William Alsup. Motions due by 1/14/2016. Pretrial Conference set for 3/30/2016 02:00 PM in Courtroom 8, 19th Floor, San Francisco before Hon. William Alsup. Signed by Judge William Alsup on 8/21/2014. (whasec, COURT STAFF) (Filed on 8/22/2014) (Entered: 08/22/2014)**
08/22/2014		CASE REFERRED to Magistrate Judge Joseph C. Spero for Settlement. (lmh, COURT STAFF) (Filed on 8/22/2014) (Entered: 08/22/2014)
08/26/2014	48	NOTICE of Appearance by Stuart Andrew Davidson (Davidson, Stuart) (Filed on 8/26/2014) (Entered: 08/26/2014)
08/26/2014	49	NOTICE of Appearance by Mark Dearman (Dearman, Mark) (Filed on 8/26/2014) (Entered: 08/26/2014)
08/27/2014	50	TRANSCRIPT ORDER by National Football League for Court Reporter Lydia Zinn. (Ruby, Allen) (Filed on 8/27/2014) (Entered: 08/27/2014)
08/27/2014	51	Transcript of Proceedings held on 08/21/2014, before Judge William H. Alsup. Court Reporter/Transcriber Lydia Zinn, Telephone number (415) 531-6587. Per General Order No. 59 and Judicial Conference policy, this transcript may be viewed only at the Clerks Office public terminal or may be purchased through the Court Reporter/Transcriber until the deadline for the Release of Transcript Restriction.After that date it may be obtained through PACER. Any Notice of Intent to Request Redaction, if required, is due no later than 5 business days from date of this filing. (Re 50 Transcript Order) Release of Transcript Restriction set for 11/25/2014. (Related documents(s) 50) (Zinn, Lydia) (Filed on 8/27/2014) (Entered: 08/27/2014)
08/28/2014	52	MOTION for leave to appear in Pro Hac Vice *of Janine Arno* (Filing fee $ 305, receipt number 0971-8852144.) Filing fee previously paid on 8/18/2014 filed by Richard Dent, Roy Green, JD Hill, James McMahon, Jeremy Newberry, Ron Pritchard, Ron Stone, Keith Van Horne, Marcellus Wiley. (Attachments: # 1 Exhibit Certificate of Good Standing)(Arno, Janine) (Filed on 8/28/2014) (Entered: 08/28/2014)
08/28/2014	53	MOTION for leave to appear in Pro Hac Vice *of Kathleen B. Douglas* (Filing fee $ 305, receipt number 0971-8851965.) Filing fee previously paid on 8/18/2014 filed by Richard Dent, Roy Green, JD Hill, James McMahon, Jeremy Newberry, Ron Pritchard, Ron Stone, Keith Van Horne, Marcellus Wiley. (Attachments: # 1 Exhibit Certificate of Good Standing)(Douglas, Kathleen) (Filed on 8/28/2014) (Entered: 08/28/2014)
08/28/2014	54	CLERK'S NOTICE. Telephonic Scheduling Conference set for 9/2/2014 at 09:00 AM in Courtroom G, 15th Floor, San Francisco before Magistrate Judge Joseph C. Spero. (klhS, COURT STAFF) (Filed on 8/28/2014) (Entered: 08/28/2014)
08/29/2014	55	MOTION for Leave to File Second Amended Complaint filed by Richard Dent, Roy Green, JD Hill, James McMahon, Jeremy Newberry, Ron Pritchard, Ron Stone, Keith Van Horne, Marcellus Wiley, Jonathan Rex Hadnot. (Attachments: # 1 Exhibit A, # 2

		Proposed Order)(Sinclair, William) (Filed on 8/29/2014) Modified on 8/29/2014 (dtmS, COURT STAFF). (Entered: 08/29/2014) ER-284
08/29/2014		Set/Reset Deadlines as to Responses due by 9/12/2014. Replies due by 9/19/2014. Motion Hearing set for 10/9/2014 10:00 AM in Courtroom 8, 19th Floor, San Francisco before Hon. William Alsup. (dtmS, COURT STAFF) (Filed on 8/29/2014) (Entered: 08/29/2014)
08/29/2014		Set/Reset Deadlines as to Motion Hearing set for 10/9/2014 08:00 AM in Courtroom 8, 19th Floor, San Francisco before Hon. William Alsup. (dt, COURT STAFF) (Filed on 8/29/2014) (Entered: 09/09/2014)
09/02/2014	56	**ORDER GRANTING PRO HAC VICE of Janine Arno by Judge William Alsup granting 52 Motion for Pro Hac Vice (dt, COURT STAFF) (Filed on 9/2/2014) (Entered: 09/02/2014)**
09/02/2014	57	**ORDER GRANTING PRO HAC VICE of Kathleen Douglas by Judge William Alsup granting 53 Motion for Pro Hac Vice (dt, COURT STAFF) (Filed on 9/2/2014) (Entered: 09/02/2014)**
09/02/2014	58	Minute Entry: TelephonicScheduling Conference held on 9/2/2014 before Magistrate Judge Joseph C. Spero. Settlement Conference set for 6/2/2015 09:30 AM in Courtroom G, 15th Floor, San Francisco. (Recording #Not Reported.) (klhS, COURT STAFF) (Date Filed: 9/2/2014) (Entered: 09/02/2014)
09/03/2014	59	NOTICE of Appearance by Janine D. Arno (Arno, Janine) (Filed on 9/3/2014) (Entered: 09/03/2014)
09/03/2014	60	NOTICE of Appearance by Kathleen Douglas (Douglas, Kathleen) (Filed on 9/3/2014) (Entered: 09/03/2014)
09/03/2014	61	**Notice and Order Setting Settlement Conference before Magistrate Judge Joseph C. Spero. Settlement Conference set for 6/2/2015 09:30 AM in Courtroom G, 15th Floor, San Francisco. Signed by Judge Joseph C. Spero on 9/3/2014. (klhS, COURT STAFF) (Filed on 9/3/2014) (Entered: 09/03/2014)**
09/08/2014	62	STIPULATION WITH PROPOSED ORDER *Granting Leave to File Amended Complaint* filed by Richard Dent, Roy Green, JD Hill, James McMahon, Jeremy Newberry, Ron Pritchard, Ron Stone, Keith Van Horne, Marcellus Wiley. (Sinclair, William) (Filed on 9/8/2014) Modified on 9/8/2014 (dtmS, COURT STAFF). (Entered: 09/08/2014)
09/08/2014	63	NOTICE by Richard Dent, Roy Green, JD Hill, James McMahon, Jeremy Newberry, Ron Pritchard, Ron Stone, Keith Van Horne, Marcellus Wiley *of Pendency of Other Action (Civil L.R. 3-13)* (Sinclair, William) (Filed on 9/8/2014) (Entered: 09/08/2014)
09/10/2014	64	**MODIFIED ORDER GRANTING MOTION FOR LEAVE TO FILE SECOND AMENDED COMPLAINT. (whalc2, COURT STAFF) (Filed on 9/10/2014). (Entered: 09/10/2014)**
09/11/2014	65	AMENDED COMPLAINT ******SECOND AMENDED COMPLAINT****** against National Football League. Filed byRon Stone, Roy Green, Ron Pritchard, Jonathan Rex Hadnot, Jeremy Newberry, James McMahon, Richard Dent, JD Hill, Marcellus Wiley, Keith Van Horne. (Sinclair, William) (Filed on 9/11/2014) (Entered: 09/11/2014)
09/24/2014	66	MOTION for leave to appear in Pro Hac Vice *for Daniel L. Nash* (Filing fee $ 305, receipt number 0971-8944057.) filed by National Football League. (Attachments: # 1 Exhibit Certificate of Good Standing)(Nash, Daniel) (Filed on 9/24/2014) (Entered: 09/24/2014)

09/24/2014	67	MOTION for leave to appear in Pro Hac Vice *for Stacey Recht Eisenstein* (Filing fee $ 305, receipt number 0971-8944027.) filed by National Football League. (Attachments: # 1 Exhibit Certificate of Good Standing)(Eisenstein, Stacey) (Filed on 9/24/2014) (Entered: 09/24/2014)
09/24/2014	68	MOTION for leave to appear in Pro Hac Vice *for Marla Axelrod* (Filing fee $ 305, receipt number 0971-8944127.) filed by National Football League. (Attachments: # 1 Exhibit Certificate of Good Standing)(Axelrod, Marla) (Filed on 9/24/2014) (Entered: 09/24/2014)
09/25/2014	69	**ORDER GRANTING 66 APPLICATION FOR ADMISSION OF ATTORNEY PRO HAC VICE.(whalc2, COURT STAFF) (Filed on 9/25/2014). (Entered: 09/25/2014)**
09/25/2014	70	**ORDER GRANTING 67 APPLICATION FOR ADMISSION OF ATTORNEY PRO HAC VICE.(whalc2, COURT STAFF) (Filed on 9/25/2014). (Entered: 09/25/2014)**
09/25/2014	71	**ORDER GRANTING 68 APPLICATION FOR ADMISSION OF ATTORNEY PRO HAC VICE.(whalc2, COURT STAFF) (Filed on 9/25/2014). (Entered: 09/25/2014)**
09/25/2014	72	MOTION to Dismiss Second Amended Complaint (Section 301 Preemption) filed by National Football League. Motion Hearing set for 10/30/2014 08:00 AM in Courtroom 8, 19th Floor, San Francisco before Hon. William Alsup. Responses due by 10/9/2014. Replies due by 10/16/2014. (Attachments: # 1 Proposed Order)(Ruby, Allen) (Filed on 9/25/2014) Modified on 9/26/2014 (dtmS, COURT STAFF). (Entered: 09/25/2014)
09/25/2014	73	Declaration of Dennis L. Curran in Support of 72 MOTION to Dismiss filed byNational Football League. (Attachments: # 1 Exhibit 1 - 5, # 2 Exhibit 6, # 3 Exhibit 7, # 4 Exhibit 8, # 5 Exhibit 9, # 6 Exhibit 10, # 7 Exhibit 11 - 14, # 8 Exhibit 15 - 17, # 9 Exhibit 18 - 20)(Related document(s) 72) (Ruby, Allen) (Filed on 9/25/2014) Modified on 9/26/2014 (dtmS, COURT STAFF). (Entered: 09/25/2014)
09/25/2014	74	MOTION to Dismiss Second Amended Complaint As Time-Barred And For Failure To State A Claim [Fed. R. Civ. Proc. 8, 9 & 12] filed by National Football League. Motion Hearing set for 10/30/2014 08:00 AM in Courtroom 8, 19th Floor, San Francisco before Hon. William Alsup. Responses due by 10/9/2014. Replies due by 10/16/2014. (Attachments: # 1 Proposed Order)(Ruby, Allen) (Filed on 9/25/2014) Modified on 9/26/2014 (dtmS, COURT STAFF). (Entered: 09/25/2014)
09/25/2014	75	Declaration of S. Sheryl Leung in Support of 74 MOTION to Dismiss filed byNational Football League. (Attachments: # 1 Exhibit A - C, # 2 Exhibit D - F, # 3 Exhibit G - K) (Related document(s) 74) (Ruby, Allen) (Filed on 9/25/2014) Modified on 9/26/2014 (dtmS, COURT STAFF). (Entered: 09/25/2014)
09/25/2014	76	Request for Judicial Notice re 74 MOTION to Dismiss filed byNational Football League. (Related document(s) 74) (Ruby, Allen) (Filed on 9/25/2014) Modified on 9/26/2014 (dtmS, COURT STAFF). (Entered: 09/25/2014)
10/03/2014	77	MOTION for Extension of Time to File Response/Reply as to 74 MOTION to Dismiss , 72 MOTION to Dismiss filed by Richard Dent, Roy Green, JD Hill, James McMahon, Jeremy Newberry, Ron Pritchard, Ron Stone, Keith Van Horne, Marcellus Wiley. (Sinclair, William) (Filed on 10/3/2014) Modified on 10/3/2014 (dtmS, COURT STAFF). (Entered: 10/03/2014)
10/06/2014	78	**ORDER TO EXTEND TIME TO RESPOND. (whalc2, COURT STAFF) (Filed on 10/6/2014). (Entered: 10/06/2014)**

10/06/2014		Set/Reset Deadlines as to 72 MOTION to Dismiss 74 MOTION to Dismiss Responses due by 10/10/2014. Replies due by 10/17/2014. (dtmS, COURT STAFF) (Filed on 10/6/2014) (Entered: 10/06/2014)
10/10/2014	79	RESPONSE (re 72 MOTION to Dismiss *Defendant National Football Leagues Notice Of Motion And Motion To Dismiss Second Amended Complaint (Section 301 Preemption)*) filed byRichard Dent, Roy Green, Jonathan Rex Hadnot, JD Hill, James McMahon, Jeremy Newberry, Ron Pritchard, Ron Stone, Keith Van Horne, Marcellus Wiley. (Attachments: # 1 Certificate/Proof of Service)(Sinclair, William) (Filed on 10/10/2014) (Entered: 10/10/2014)
10/10/2014	80	RESPONSE (re 74 MOTION to Dismiss *Defendant National Football League's Notice Of Motion And Motion To Dismiss Second Amended Complaint As Time-Barred And For Failure To State A Claim [Fed. R. Civ. Proc. 8, 9 & 12]*) filed byRichard Dent, Roy Green, Jonathan Rex Hadnot, JD Hill, James McMahon, Jeremy Newberry, Ron Pritchard, Ron Stone, Keith Van Horne, Marcellus Wiley. (Attachments: # 1 Certificate/Proof of Service)(Sinclair, William) (Filed on 10/10/2014) (Entered: 10/10/2014)
10/17/2014	81	REPLY (re 72 MOTION to Dismiss) (Section 301 Preemption) filed byNational Football League. (Ruby, Allen) (Filed on 10/17/2014) Modified on 10/20/2014 (dtmS, COURT STAFF). (Entered: 10/17/2014)
10/17/2014	82	REPLY (re 74 MOTION to Dismiss) filed byNational Football League. (Ruby, Allen) (Filed on 10/17/2014) Modified on 10/20/2014 (dtmS, COURT STAFF). (Entered: 10/17/2014)
10/24/2014	83	MOTION for Discovery ****Notice of Motion, Motion for Discovery Conference**** filed by Richard Dent, Roy Green, Jonathan Rex Hadnot, JD Hill, James McMahon, Jeremy Newberry, Ron Pritchard, Ron Stone, Keith Van Horne, Marcellus Wiley. Motion Hearing set for 12/4/2014 08:00 AM in Courtroom 8, 19th Floor, San Francisco before Hon. William Alsup. Responses due by 11/7/2014. Replies due by 11/14/2014. (Attachments: # 1 Certificate/Proof of Service, # 2 Exhibit A, # 3 Exhibit 1, # 4 Exhibit 2, # 5 Proposed Order)(Sinclair, William) (Filed on 10/24/2014) (Entered: 10/24/2014)
10/28/2014	84	**ORDER RE 83 MOTION FOR DISCOVERY CONFERENCE.(whalc2, COURT STAFF) (Filed on 10/28/2014). (Entered: 10/28/2014)**
10/30/2014	85	TRANSCRIPT ORDER by National Football League for Court Reporter Jo Ann Bryce. (Miller, Timothy) (Filed on 10/30/2014) (Entered: 10/30/2014)
10/30/2014	88	Minute Entry: Motion Hearing held on 10/30/2014 before Judge William Alsup (Date Filed: 10/30/2014) re 74 MOTION to Dismiss *Defendant National Football League's Notice Of Motion And Motion To Dismiss Second Amended Complaint As Time-Barred And For Failure To State A Claim [Fed. R. Civ. Proc. 8, 9 & 12]* filed by National Football League. (Court Reporter JoAnn Bryce.) (dt, COURT STAFF) (Date Filed: 10/30/2014) (Entered: 11/03/2014)
10/31/2014	86	TRANSCRIPT ORDER by Richard Dent, Roy Green, Jonathan Rex Hadnot, JD Hill, James McMahon, Jeremy Newberry, Ron Pritchard, Ron Stone, Keith Van Horne, Marcellus Wiley for Court Reporter Jo Ann Bryce. (Sinclair, William) (Filed on 10/31/2014) (Entered: 10/31/2014)
10/31/2014	87	Transcript of Proceedings held on 10/30/14, before Judge William H. Alsup. Court Reporter Jo Ann Bryce, Telephone number 510-910-5888, email: joann_bryce@cand.uscourts.gov. Per General Order No. 59 and Judicial Conference policy, this transcript may be viewed only at the Clerk's Office public terminal or may be purchased through the Court Reporter until the deadline for the Release of Transcript

		Restriction after 90 days. After that date, it may be obtained through PACER. Any Notice of Intent to Request Redaction, if required, is due no later than 5 business days from date of this filing. (Re 85 Transcript Order) Release of Transcript Restriction set for 1/29/2015. (Related documents(s) 85) (Bryce, Joann) (Filed on 10/31/2014) (Entered: 10/31/2014)
11/05/2014	89	Letter from National Football League Players Association . (Tulumello, Andrew) (Filed on 11/5/2014) (Entered: 11/05/2014)
11/17/2014	90	STIPULATION WITH PROPOSED ORDER *Re Briefing On Submission Of The National Football League Players Association* filed by National Football League. (Ruby, Allen) (Filed on 11/17/2014) (Entered: 11/17/2014)
11/18/2014	91	**MODIFIED ORDER RE BRIEFING ON SUBMISSION OF THE NATIONAL FOOTBALL LEAGUE PLAYERS ASSOCIATION. (whalc2, COURT STAFF) (Filed on 11/18/2014). (Entered: 11/18/2014)**
11/19/2014	92	Letter from National Football League Players Association . (Tulumello, Andrew) (Filed on 11/19/2014) (Entered: 11/19/2014)
11/21/2014	93	Brief re 92 Letter ******Plaintiffs' Reply in Support of The National Football League Players Association's Letter to Judge Alsup***** filed byRichard Dent, Roy Green, Jonathan Rex Hadnot, JD Hill, James McMahon, Jeremy Newberry, Ron Pritchard, Ron Stone, Keith Van Horne, Marcellus Wiley. (Attachments: # 1 Certificate/Proof of Service) (Related document(s) 92) (Sinclair, William) (Filed on 11/21/2014) (Entered: 11/21/2014)
11/21/2014	94	Brief re 92 Letter *Defendant National Football Leagues Response To Third-Party National Football League Players Associations Letter Brief* filed byNational Football League. (Related document(s) 92) (Ruby, Allen) (Filed on 11/21/2014) (Entered: 11/21/2014)
11/24/2014	95	**REQUEST FOR ADDITIONAL STATEMENT. Signed by Judge Alsup on 11/24/2014. (whalc2, COURT STAFF) (Filed on 11/24/2014) (Entered: 11/24/2014)**
11/25/2014	96	**REQUEST FOR ADDITIONAL STATEMENT FROM THE NATIONAL FOOTBALL LEAGUE PLAYERS ASSOCIATION. Signed by Judge Alsup on 11/25/2014. (whalc2, COURT STAFF) (Filed on 11/25/2014) (Entered: 11/25/2014)**
11/26/2014	97	RESPONSE re 95 Order filed byNational Football League. (Related document(s) 95) (Ruby, Allen) (Filed on 11/26/2014) Modified on 12/1/2014 (dtmS, COURT STAFF). (Entered: 11/26/2014)
11/26/2014	98	RESPONSE re 95 Order filed byRichard Dent, Roy Green, Jonathan Rex Hadnot, JD Hill, James McMahon, Jeremy Newberry, Ron Pritchard, Ron Stone, Keith Van Horne, Marcellus Wiley. (Attachments: # 1 Certificate/Proof of Service)(Related document(s) 95) (Sinclair, William) (Filed on 11/26/2014) Modified on 12/1/2014 (dtmS, COURT STAFF). (Entered: 11/26/2014)
12/02/2014	99	Letter from NFLPA . (Tulumello, Andrew) (Filed on 12/2/2014) (Entered: 12/02/2014)
12/03/2014	100	**REQUEST TO NFL FOR FURTHER SUBMISSION. Signed by Judge Alsup on 12/3/2014. (whalc2, COURT STAFF) (Filed on 12/3/2014) (Entered: 12/03/2014)**
12/04/2014	101	Brief re 99 Letter *Defendant National Football League's Response To The Players Association's December 2, 2014 Letter Brief* filed byNational Football League. (Related document(s) 99) (Ruby, Allen) (Filed on 12/4/2014) (Entered: 12/04/2014)
12/04/2014	102	Letter Brief re 99 Letter ******Plaintiffs' Reply in Support of The National Football League*

		*Players Association's December 2, 2014 Letter**** filed byRichard Dent, Roy Green, Jonathan Rex Hadnot, JD Hill, James McMahon, Jeremy Newberry, Ron Pritchard, Ron Stone, Keith Van Horne, Marcellus Wiley. (Attachments: # 1 Certificate/Proof of Service) (Related document(s) 99) (Sinclair, William) (Filed on 12/4/2014) (Entered: 12/04/2014)
12/05/2014	103	Brief re 100 Order *Re Grievances* filed byNational Football League. (Attachments: # 1 Declaration of Daniel L. Nash, # 2 Exhibit A, # 3 Exhibit B, # 4 Exhibit C)(Related document(s) 100) (Ruby, Allen) (Filed on 12/5/2014) (Entered: 12/05/2014)
12/05/2014	104	**REQUEST FOR FURTHER STATEMENT FROM PLAINTIFFS. Signed by Judge Alsup on 12/5/2014. (whalc2, COURT STAFF) (Filed on 12/5/2014) (Entered: 12/05/2014)**
12/08/2014	105	Brief re 103 Brief ****Plaintiffs' Response to the National Football League's December 5, 2014 Letter**** filed byRichard Dent, Roy Green, Jonathan Rex Hadnot, JD Hill, James McMahon, Jeremy Newberry, Ron Pritchard, Ron Stone, Keith Van Horne, Marcellus Wiley. (Attachments: # 1 Certificate/Proof of Service, # 2 Exhibit 1)(Related document(s) 103) (Sinclair, William) (Filed on 12/8/2014) (Entered: 12/08/2014)
12/17/2014	106	**ORDER RE MOTIONS TO DISMISS AND REQUESTS FOR JUDICIAL NOTICE (whalc2, COURT STAFF) (Filed on 12/17/2014) (Entered: 12/17/2014)**
12/31/2014	107	**JUDGMENT. Signed by Judge Alsup on 12/31/2014. (whalc2, COURT STAFF) (Filed on 12/31/2014) (Entered: 12/31/2014)**
01/27/2015	108	NOTICE OF APPEAL to the 9th Circuit Court of Appeals filed by Richard Dent, Roy Green, Jonathan Rex Hadnot, JD Hill, James McMahon, Jeremy Newberry, Ron Pritchard, Ron Stone, Keith Van Horne, Marcellus Wiley. Appeal of Judgment 107 (Appeal fee of $505 receipt number 0971-9238711 paid.) (Sinclair, William) (Filed on 1/27/2015) (Entered: 01/27/2015)
01/28/2015	109	USCA Case Number **15-15143** for 108 Notice of Appeal, filed by Ron Pritchard, Ron Stone, Richard Dent, Roy Green, Jonathan Rex Hadnot, Keith Van Horne, JD Hill, Marcellus Wiley, Jeremy Newberry, James McMahon. (dtmS, COURT STAFF) (Filed on 1/28/2015) (Entered: 01/28/2015)
02/24/2015	110	Transcript Designation Form for proceedings held on 08/21/2014 and 10/30/2014 before Judge William Alsup, re 108 Notice of Appeal, 109 USCA Case Number, Transcript due by 3/26/2015. (Sinclair, William) (Filed on 2/24/2015) (Entered: 02/24/2015)
03/09/2016	111	NOTICE of Appearance by Rebecca Ariel Jacobs (Jacobs, Rebecca) (Filed on 3/9/2016) (Entered: 03/09/2016)
03/09/2016	112	**See Entry 113** Joint MOTION to Relate Case filed by NFL Clubs. (Attachments: # 1 Exhibit A)(Jacobs, Rebecca) (Filed on 3/9/2016) Modified on 3/9/2016 (dtmS, COURT STAFF). (Entered: 03/09/2016)
03/09/2016	113	Amended MOTION to Relate Case filed by NFL Clubs. (Attachments: # 1 Exhibit A) (Jacobs, Rebecca) (Filed on 3/9/2016) (Entered: 03/09/2016)
03/16/2016	114	**ORDER GRANTING 113 MOTION TO RELATE CASE.(whalc2, COURT STAFF) (Filed on 3/16/2016) (Entered: 03/16/2016)**
10/05/2018	115	MANDATE of USCA as to 108 Notice of Appeal, filed by Ron Pritchard, Ron Stone, Richard Dent, Roy Green, Jonathan Rex Hadnot, Keith Van Horne, JD Hill, Marcellus Wiley, Jeremy Newberry, James McMahon (sxbS, COURT STAFF) (Filed on 10/5/2018) (Entered: 10/05/2018)

10/09/2018	116	**REQUEST FOR CASE MANAGEMENT SUGGESTIONS. Signed by Judge Alsup on 10/9/2018. (whalc2, COURT STAFF) (Filed on 10/9/2018) (Entered: 10/09/2018)**
10/23/2018	117	Statement re 116 Order *Joint Case Management Suggestions* by National Football League. (DiCanio, Jack) (Filed on 10/23/2018) (Entered: 10/23/2018)
10/25/2018	118	**ORDER RE BRIEFING SCHEDULE. Further Case Management Conference set for 3/7/2019 08:00 AM in San Francisco, Courtroom 12, 19th Floor. Motion Hearing set for 3/7/2019 08:00 AM in San Francisco, Courtroom 12, 19th Floor before Judge William Alsup. Amended Pleadings due by 12/5/2018. Motions due by 1/16/2019. Signed by Judge Alsup on 10/25/2018. (whalc2, COURT STAFF) (Filed on 10/25/2018) (Entered: 10/25/2018)**
12/05/2018	119	AMENDED COMPLAINT *(Third)* against All Defendants. Filed byRon Stone, Roy Green, Ron Pritchard, Jeremy Newberry, James McMahon, Richard Dent, JD Hill, National Football League Players Association, Marcellus Wiley, Keith Van Horne. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Certificate/Proof of Service)(Sinclair, William) (Filed on 12/5/2018) (Entered: 12/05/2018)
01/16/2019	120	NOTICE of Appearance by Patrick Maben Hammon (Hammon, Patrick) (Filed on 1/16/2019) (Entered: 01/16/2019)
01/16/2019	121	MOTION to Dismiss *Third Amended Complaint* filed by National Football League. Motion Hearing set for 3/7/2019 08:00 AM in San Francisco, Courtroom 12, 19th Floor before Judge William Alsup. Responses due by 2/5/2019. Replies due by 2/14/2019. (Attachments: # 1 Proposed Order)(DiCanio, Jack) (Filed on 1/16/2019) (Entered: 01/16/2019)
01/18/2019	122	NOTICE by National Football League *Notice of Withdrawal of Attorney Timothy A. Miller* (DiCanio, Jack) (Filed on 1/18/2019) (Entered: 01/18/2019)
01/18/2019	123	MOTION for leave to appear in Pro Hac Vice *for Karen Hoffman Lent* (Filing fee $ 310, receipt number 0971-13017536.) filed by National Football League. (Attachments: # 1 Certificate of Good Standing)(Lent, Karen) (Filed on 1/18/2019) (Entered: 01/18/2019)
01/18/2019	124	**ORDER by Judge William Alsup granting 123 Motion for Pro Hac Vice as to Karen Hoffman Lent. (tlhS, COURT STAFF) (Filed on 1/18/2019) (Entered: 01/18/2019)**
02/05/2019	125	OPPOSITION/RESPONSE (re 121 MOTION to Dismiss *Third Amended Complaint*) filed byRichard Dent, Roy Green, JD Hill, James McMahon, Jeremy Newberry, Ron Pritchard, Ron Stone, Keith Van Horne, Marcellus Wiley. (Attachments: # 1 Certificate/Proof of Service)(Sinclair, William) (Filed on 2/5/2019) (Entered: 02/05/2019)
02/14/2019	126	CLERK'S NOTICE CONTINUING HEARINGS: Due to unavailability of the Court, the further case management conference and motion hearing are hereby rescheduled. Case Management Statement due by 3/14/2019. Further Case Management Conference previously set for 3/7/2019 8:00 AM is rescheduled to **3/21/2019 08:00 AM**. Motion Hearing re 121 MOTION to Dismiss previously set for 3/7/2019 8:00 AM is rescheduled to **3/21/2019 08:00 AM** in San Francisco, Courtroom 12, 19th Floor before Judge William Alsup. The previously set briefing schedule remains in effect. *(This is a text-only entry generated by the court. There is no document associated with this entry.)* (tlhS, COURT STAFF) (Filed on 2/14/2019) Modified on 2/14/2019 (tlhS, COURT STAFF). (Entered: 02/14/2019)
02/14/2019	127	REPLY (re 121 MOTION to Dismiss *Third Amended Complaint*) *Defendant National Football Leagues Reply In Support Of Its Motion To Dismiss Third Amended Complaint* filed by National Football League. (DiCanio, Jack) (Filed on 2/14/2019) Modified on 2/15/2019 (amgS, COURT STAFF). (Entered: 02/14/2019)

03/14/2019	128	STIPULATION WITH PROPOSED ORDER *Stipulation And [Proposed] Order To Extend Page Limits For Joint Case Management Statement [Civ. Local R. 7-11, 7-12]* filed by National Football League and Richard Dent, et al. (DiCanio, Jack) (Filed on 3/14/2019) Modified on 3/15/2019 (amgS, COURT STAFF). (Entered: 03/14/2019)
03/14/2019	129	JOINT CASE MANAGEMENT STATEMENT *[Civ. Local R. 16-9]* filed by National Football League and Richard Dent, et al. (DiCanio, Jack) (Filed on 3/14/2019) Modified on 3/15/2019 (amgS, COURT STAFF). (Entered: 03/14/2019)
03/21/2019	130	**Minute Entry for proceedings held before Judge William Alsup: Motion Hearing re 121 MOTION to Dismiss *Third Amended Complaint* held on 3/21/2019. Further Case Management Conference NOT held on 3/21/2019. Parties are directed to highlight pertinent sections of the agreed upon transcript of oral argument before the United States Court of Appeals for the Ninth Circuit and submit to the court by 3/22/2019 at 5 PM. Matter taken under submission. Court to issue written order. (Total Time in Court: 1 hour 14 minutes.)** **Court Reporter: Debra Pas.** **Plaintiff Attorney: Phillip Closius, Mark Dearman.** **Defendant Attorney: Jack DiCanio, Daniel Nash, James Tysse.** ***(This is a text-only entry generated by the court. There is no document associated with this entry.)* (tlhS, COURT STAFF) (Date Filed: 3/21/2019) (Entered: 03/22/2019)**
03/22/2019	131	NOTICE by National Football League re 130 Motion Hearing,,,, Case Management Conference - Further,,, *Notice of Designated Transcript pursuant to Court's March 21, 2019 Order* (Attachments: # 1 Attachment - Stipulated Transcript of December 15, 2016 Ninth Circuit oral argument)(Nash, Daniel) (Filed on 3/22/2019) (Entered: 03/22/2019)
03/25/2019	132	TRANSCRIPT ORDER for proceedings held on March 21, 2019 before Judge William Alsup by Richard Dent, Roy Green, JD Hill, James McMahon, National Football League Players Association, Jeremy Newberry, Ron Pritchard, Ron Stone, Keith Van Horne, Marcellus Wiley, for Court Reporter Debra Pas. (Sinclair, William) (Filed on 3/25/2019) (Entered: 03/25/2019)
03/25/2019	133	TRANSCRIPT ORDER for proceedings held on March 21, 2019 before Judge William Alsup by National Football League, for Court Reporter Debra Pas. (Nash, Daniel) (Filed on 3/25/2019) (Entered: 03/25/2019)
04/11/2019	134	Transcript of Proceedings held on 3-21-2019, before Judge William H. Alsup. Court Reporter/Transcriber Debra L. Pas, CRR, telephone number (415) 431-1477/Email: Debra_Pas@cand.uscourts.gov. Per General Order No. 59 and Judicial Conference policy, this transcript may be viewed only at the Clerk's Office public terminal or may be purchased through the Court Reporter/Transcriber until the deadline for the Release of Transcript Restriction. After that date it may be obtained through PACER. Any Notice of Intent to Request Redaction, if required, is due no later than 5 business days from date of this filing. (Re 132 Transcript Order, 133 Transcript Order) Release of Transcript Restriction set for 7/10/2019. (Related documents(s) 132 , 133) (pasdl50S, COURT STAFF) (Filed on 4/11/2019) (Entered: 04/11/2019)
04/18/2019	135	**ORDER GRANTING 121 MOTION TO DISMISS. Signed by Judge William Alsup. (whalc2, COURT STAFF) (Filed on 4/18/2019) (Entered: 04/18/2019)**
04/18/2019	136	**JUDGMENT. Signed by Judge Alsup on 4/18/2019. (whalc2, COURT STAFF) (Filed on 4/18/2019) (Entered: 04/18/2019)**
04/18/2019	137	**JUDGMENT (AMENDED). Signed by Judge Alsup on 4/18/2019. (whalc2, COURT STAFF) (Filed on 4/18/2019) (Entered: 04/18/2019)**

05/14/2019	138	NOTICE OF APPEAL to the 9th Circuit Court of Appeals filed by Richard Dent, Roy Green, JD Hill, James McMahon, Jeremy Newberry, Ron Pritchard, Ron Stone, Keith Van Horne, Marcellus Wiley. Appeal of Order on Motion to Dismiss 135 (Appeal fee of $505 receipt number 0971-13346117 paid.) (Attachments: # 1 Certificate/Proof of Service)(Sinclair, William) (Filed on 5/14/2019) (Entered: 05/14/2019)
05/14/2019	139	USCA Case Number 19-16017 9th Circuit for 138 Notice of Appeal, filed by Ron Pritchard, Ron Stone, Richard Dent, Roy Green, Keith Van Horne, JD Hill, Marcellus Wiley, Jeremy Newberry, James McMahon. (amgS, COURT STAFF) (Filed on 5/14/2019) (Entered: 05/16/2019)
06/14/2019	140	Transcript Designation Form for proceedings held on March 21, 2019 before Judge William Alsup, re 138 Notice of Appeal, 139 USCA Case Number, Transcript due by 6/13/2019. (Sinclair, William) (Filed on 6/14/2019) (Entered: 06/14/2019)

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